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Supreme Court, U.S.
FILED

No. 95-____

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IN THE

Supreme Court Of The United States

October Term 1995

ROGER O. BROOKS, et al.,

Petitioners,

v.

UNITED AIRLINES, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Colorado

PETITION FOR WRIT OF CERTIORARI

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68 pgs

QUESTIONS PRESENTED FOR REVIEW

1. Whether unrelated parties who possess no labor, contract or employment relation under the Railway Labor Act ("RLA") can fall under the preemptive purview of the Act.

2. Whether the ruling below holding that Plaintiffs' independent State-law claims against Defendants were preempted under the RLA is contrary to the express statutory provisions thereof limiting the Act's application to disputes between a carrier and its employees.

3. Whether the ruling below holding that Plaintiffs' independent State-law claims against Defendants were preempted under the RLA is contrary to this Court's decision in *Hawaiian Airlines, Inc. v. Norris*, 114 S.Ct. 2239 (1994).

4. Whether any application of preemption under the RLA is permissible when it leaves the injured parties without any state, federal or administrative remedy whatsoever and no access to any forum to resolve their claims.

5. Whether the application of preemption below constitutes an unwarranted expansion of the doctrine by, *inter alia*, extinguishing independent State-law causes of action involving unrelated parties that leaves the injured parties without any remedy.

PARTIES TO THE PROCEEDING

The Petitioners are:

ROGER O. BROOKS, CAREY F. SHARP, ROBERT L. WILLIAMS, BILL J. WATKINS, ROBERT W. VANCE, JOSEPH D. ABELL, JEFF ABRAMS, JAMES M. ACTOR, DANIEL R. ADAIR, MALCOLM C. AF UHR, JAMES H. ALLEN, III, JIM D. APPLEBY, TERRY E. ARMBRISTER, B.A. ARNOT, MICHAEL A. AVERBECK, DOUGLAS A. BADGER, DANIEL A. BAKER, THOMAS A. BANISTER, FORREST H. BAILEY, JR., JACK M. BAILEY, LAWSON E. BARCLAY, JOHN A. BATA, ROBERT G. BEABOUT, PATRICK J. BECKHAM, CHARLES E. BEVILLE, LOWELL K. BILSBOROUGH, ERIC L. BJORN, GARY G. BLANCHARD, GREGORY M. BOYER, WHITNEY A. BRANDON, RICHARD C. BRIGHT, DEAN ELTON BRISTOL, TEDDY E. BROCK, MICHAEL J. BRONOWSKI, JERRY W. BROOM, MICHAEL F. BRUMFIELD, JAMES W. BURMAN, JOHN E. BURT, MICHAEL B. BURTON, DAN J. CADY, CHARLES T. CALKINS, JAMES W. CANNON, PAUL W. CAREY, VERNE W. CARLSON, CHARLES L. CARPENTER, LLOYD D. CARR, WALLACE E. CARROLL, FRED W. CHAPMAN, DOUG E. CHRISTENSEN, ROBERT H. CHURCHILL, SAM P. CLARK, NICOLAS S. CLINGER, KENNETH COGGESHALL, HOWARD COLLING, DAVID B. COMISH, JOHN S. CONNORS, EARNEST D. COOK, DENNIS M. COXS, GARY L. CRAVEN, JON N. CROUCH, MICHAEL R. DACIEK, RICHARD P. DAKE, JOHN L. DAMERON, WILLIAM K. DENDY, GARY M. DESPAIN, MELVIN D'LOSS, DONALD D. DONALDSON, JOHN A. DUNCAN, DENTON J. DYKES, NORMAN R. EDSON, DAN C. FARLIN, WALTER A. FELIZIANETTI, JOSEPH H. FERGUSON, DENFORD D. FINKE, RICHARD R.

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The Respondents are:

UNITED AIRLINES, INC., a Delaware Corp., RICHARD J. FERRIS, JAMES J. HARTIGAN, DAVID L. PRINGLE and JOHN DOES 1 through 25,

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A. THE RULING BELOW HAS LEFT PLAINTIFFS INJURED BY VIOLATIONS OF STATE LAW WITHOUT ANY REMEDY OR RECOURSE AGAINST THESE DEFENDANTS FOR THE HARM THEY HAVE SUSTAINED 5

B. THIS RADICAL EXPANSION OF PREEMPTION BELOW HAS EFFECTIVELY GRANTED ABSOLUTE IMMUNITY FROM SUIT TO DEFENDANTS WHO ARE UNRELATED TO THE PLAINTIFFS WHOM THEY HARM 11

C. IT IS AN IMPROPER AND UNWARRANTED EXPANSION OF THE FEDERAL DOCTRINE OF PREEMPTION UNDER THE RLA TO EXTINGUISH STATE-BASED RIGHTS AND LEAVE PLAINTIFFS WITHOUT A REMEDY . . 19

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OPINIONS BELOW

The Order of the Colorado Court of Appeals (not selected for publication) dated June 16, 1994 is reprinted in the Appendix at pps. A-1 through A-20.

The Order of the Colorado Supreme Court denying *certiorari* review dated March 20, 1995 is reprinted in the Appendix at pps. A-21 through A-30.

JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 1257(a). The Order of the Colorado Supreme Court denying *certiorari* review was entered on March 20, 1995. An extension of time within which to file this Petition was granted by Justice Breyer on June 8, 1995, up to and including August 17, 1995.

STATEMENT OF THE CASE

Petitioners herein (Plaintiffs below) are 775 former employees of Frontier Airlines, whose independent tort and contract claims arise under Colorado common and statutory law in connection with actions taken by Respondents (Defendants below) shortly before Frontier Airlines filed for Bankruptcy in 1986. Plaintiffs brought state-based causes of action against Defendants for, *inter alia*, tortious interference with contract and misrepresentation.

As part of the 1985 acquisition of Frontier Airlines by People Express Airlines, Plaintiffs negotiated a series of express contractual protections with People Express designed to protect them against third party interference with their livelihood, Frontier's assets, or Frontier's commercial viability. Among other things, these contractual protections limited the sale or transfer of Frontier's assets to another airline without Plaintiffs' consent, and provided that Frontier would be operated as a separate entity and not merged with any other air carrier. These contractual protections and guarantees were included in an agreement dated October 17, 1985 between Frontier, People Express, and Plaintiffs.

In July 1986, Defendants tortiously interfered with these contractual protections by, *inter alia*, inducing People Express to sell to United Airlines $50 million of Frontier's key operational assets and by misrepresenting Defendants' true intent not to acquire Frontier. These actions led to the financial collapse of Frontier, the termination of Plaintiffs' employment, and the damages sustained by Plaintiffs herein.

The Colorado Courts ruled that the October 17, 1985 Agreement was, in part, a collective bargaining agreement, and determined that Plaintiffs' claims required at least some interpretation of that agreement, such that all of Plaintiffs' state law claims were automatically preempted under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.* Because the Defendants

had no RLA relationship, no collective bargaining agreement ("CBA") and no labor agreement or relations between them and Plaintiffs, this broad application of Federal preemption left Plaintiffs without a state, federal or administrative remedy or forum to adjudicate their claims against Defendants.

Federal preemption was never designed or intended to be expansively applied in a fashion that extinguishes state-based causes of action and leaves injured Plaintiffs without a remedy. Such an unwarranted extension of Federal preemption has operated to effectively grant absolute immunity to Defendants in a way that Congress never intended. The unwarranted expansion of preemption as interpreted and applied below has allowed an inconsistent and harsh application of the doctrine that upsets the Federal balance of power and usurps the rights of States to grant their Citizens legal remedies and a forum in which to adjudicate them.

SUMMARY OF ARGUMENT

In an unbroken line of decisions over the last sixty years, culminating in the case of *Hawaiian Airlines, Inc. v. Norris*, 114 S.Ct. 2239 (1994), this Court has defined and restricted the doctrine of Federal preemption of state-based rights under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*

The facts and issues of this case are uniquely qualified for *certiorari* review because this is the first instance that preemption under the RLA has been radically expanded to preclude state-based claims in a case involving unrelated (non-RLA) parties who have no labor or employment relationship, in a fashion that leaves the injured parties wholly without remedy or recourse under law.

Hawaiian Airlines cautions against failure to determine "the threshold question whether the dispute was subject to the RLA in the first instance." 114 S.Ct. at 2251. The RLA does not apply to the parties in this case. No labor or employment

relation has ever existed between these parties, nor has there ever existed any CBA or labor agreement between them. Plaintiffs are not "employees" as defined by the RLA and Defendants are not their "carrier." RLA jurisdiction over the parties' State-law dispute does not exist; Plaintiffs are statutorily prohibited from bringing an RLA action against the Defendants, and Defendants are not required or bound to arbitrate Plaintiffs' claims. How can an interpretation which preempts those very same claims against Defendants under the RLA be valid?

The Colorado Courts have unduly expanded Federal preemption beyond the statutory provisions of and Congressional intent behind the RLA in direct contravention of this Court's decisions spanning six decades and culminating in *Hawaiian Airlines*. This constitutes an injustice of inordinate magnitude.

This Court has repeatedly spoken to the issue of unwarranted expansion of Federal preemption under the RLA, and restricted the purview of this Federal statute. Nevertheless, this Court's concern has gone unheeded in the Courts below, which have granted absolute immunity to Defendants for causing compensable harm under State law to Plaintiffs.

The effect of this undue expansion of Federal preemption is three fold: First, it leaves the injured parties (Plaintiffs herein) without any state, federal or administrative remedy or recourse against Defendants for the actionable harm they have sustained; Second, it grants absolute immunity from suit to Defendants for harm caused to Plaintiffs injured by independent violation of State law; and Third, it unduly and impermissibly expands the Federal doctrine of preemption under the RLA so as to extinguish state-based rights in favor of a broad and expansive interpretation of preemption that is contrary to the decisions of this Court over the last sixty years.

ARGUMENT

A. THE RULINGS BELOW HAVE LEFT PLAINTIFFS INJURED BY VIOLATIONS OF STATE LAW WITHOUT ANY REMEDY OR RECOURSE AGAINST THESE DEFENDANTS FOR THE HARM THEY HAVE SUSTAINED

Neither the statutory purpose nor the Congressional intent behind Federal preemption under the RLA is to leave these injured Plaintiffs without a state, federal or administrative remedy or forum to adjudicate their claims. Any interpretation of the RLA which effects such a result is, as in this case, contrary to the express terms of the RLA itself, Congressional intent in enacting this statute, and the interpretive decisions of this Court over the last sixty years. It constitutes a manifest injustice and an undue extension of Federal preemption to usurp the province of state-based rights by *totally* extinguishing those rights and leaving the injured parties without a remedy.

In *Hawaiian Airlines, Inc. v. Norris,* 114 S.Ct. 2239 (1994), this Court reviewed the history and Congressional intent behind the RLA and reaffirmed the restrictive scope of RLA-based preemption. *Hawaiian Airlines* noted the somewhat contradictory nature of the debate surrounding the RLA's enactment in 1926, and observed that: "This inconclusive debate hardly calls for fashioning a broad rule of preemption."[1] *Hawaiian Airlines* also noted that, even though there is some broad phraseology in 45 U.S.C. § 152 First, "this does not compel the conclusion that all issues touching on the employment relationship must be resolved through arbitration or that all claims involving rights and duties that exist independent of the CBA are thereby preempted. Our precedents squarely reject this pervasive preemption."[2] *Hawaiian Airlines* concluded that:

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[1] 114 S.Ct. at 2245, n.4.

[2] *Id.* at n.5.

> [E]ven accepting that § 151a is susceptible of more than one interpretation, no proposed interpretation demonstrates a clear and manifest congressional purpose to create a regime that broadly preempts substantive protections extended by the states, independent of any negotiated labor agreement.[3]

No case is more representative of the "pervasive preemption" rejected in *Hawaiian Airlines* than the case at bar.

The parties in this case are not bound to arbitrate any disputes. Nor does there exist any grievance mechanism, dispute resolution, or other administrative procedure between or available to the parties in this case. These parties have no labor, employment, contractual, or statutory relationship, and Plaintiffs have no forum to redress their State-based claims against Defendants other than in the State courts below.

The Defendants are non-signatories and non-parties to the CBA between Plaintiffs and their former employer and consequently, are neither bound by nor required to arbitrate or settle any disputes with Plaintiffs under that CBA.[4] Plaintiffs' CBA with their former employer (Frontier Airlines) does not bind Defendants, nor does it define or state Defendants' rights or obligations in any fashion. Defendants had no involvement in the negotiation and execution of that CBA, nor are they intended beneficiaries thereof. Defendants are *complete strangers* to Plaintiffs' CBA with their former employer, which gives Plaintiffs no contractual, statutory, or procedural rights whatsoever

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[3] *Id.* at 2245.

[4] In *United Food and Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 368-69 (6th Cir. 1994), the Sixth Circuit rejected an expansive application of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), and held that "'a district court does not have subject matter jurisdiction over a non-signatory to a collective bargaining agreement, where no rights or duties of the non-signatory party are stated in the terms and conditions of the contract.'"

against Defendants, nor does it enable or authorize Plaintiffs to maintain arbitration, grievance or administrative proceedings with Defendants, including any RLA-based procedures.

The RLA itself neither applies to nor provides any dispute resolution procedure for these parties, nor does any other Federal statute. Plaintiffs' *sole* remedy against Defendants is under State law in the Courts below. No other remedy or forum exists. If the decisions below are sustained, Plaintiffs will be left without a remedy and without a forum. This is unjust, unfair, and inequitable, and contrary to what Congress intended.

It can be clearly seen from both the RLA itself and the Congressional intent behind its enactment that at no time did Congress intend the RLA to supplant free access to State courts for adjudication of State claims involving independent and unrelated parties. "Whether federal law preempts a state law establishing a cause of action is a question of congressional intent." *Hawaiian Airlines*, 114 S.Ct. at 2243. A "federal statute will be read to supersede a state's historic powers only if this is 'the clear and manifest purpose of Congress.'" *Id.* No such clear or manifest intent exists in this case.

This Court stated in *Hawaiian Airlines* that "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes ." *Id.* The parties in this case have no "labor-management" relationship and are not seeking to resolve "a labor dispute." There is no Congressional intent in the RLA to preempt state-based causes of action in such a case.

Hawaiian Airlines reiterated the procedure by which the RLA resolves disputes between labor and management as follows:

> [The RLA] establishes a mandatory arbitral mechanism for 'the prompt and orderly settlement' of two

> classes of disputes. The first class, those concerning 'rates of pay, rules or working conditions,' are deemed 'major' disputes. Major disputes relate to 'the formation of collective bargaining agreements or efforts to secure them.' The second class of disputes, known as 'minor' disputes, 'gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.' Minor disputes involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation.' Thus, 'major disputes seek to create contractual rights, minor disputes to enforce them.'[5]

This case does not involve any "controversy" over any "existing" CBA between the parties. There is no past or existing CBA or any other labor agreement between the parties to this case. This case involves neither a "major" nor a "minor" dispute under the RLA. This is not a case where the RLA's operations are even at issue. Plaintiffs have never had any employment or labor relationship with Defendants, have no labor-based grievances to assert against Defendants, have no contract-based rights or remedies to assert against Defendants, and cannot compel Defendants to arbitrate this dispute. Plaintiffs' claims arise *independently* under Colorado law and can be adjudicated *only* in a judicial forum.

The RLA itself makes clear that Congress only intended to regulate (and therefore preempt) disputes between employers and their employees, and not to allow an undue expansion beyond this employment relationship. Section 152 First provides that its terms apply only to a "dispute between the carrier and the employees thereof." Section 152 Second states that only "disputes between the carrier or carriers and its or their employees shall be considered," and Section 152 Fifth provides that

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[5] *Hawaiian Airlines*, 114 S.Ct. at 2243-44 [citations omitted].

only a "dispute between a carrier or carriers and its or their employees" is being regulated under the RLA

It was never intended by Congress that the RLA provide an arbitral forum for the resolution of disputes between unrelated parties outside its statutory purview nor does the RLA by its terms allow for such an interpretation. The "RLA provides a mandatory arbitral forum for the resolution of 'disputes between an...employee...and a carrier....'" *Davies v. American Airlines, Inc.*, 971 F.2d 463, 465 (10th Cir. 1992). Thus the Sixth Circuit held in *Grand Trunk Western Railway Co. v. United Transportation Union Local Lodge 787*, 755 F.2d 931 (6th Cir. 1985) (unpublished) that the "RLA, by its terms, applies only to disputes between an employer and its employees, and not employees of a third party." Defendants herein could possibly invoke preemption against *their own* employees, but not the former employees of Frontier Airlines, the Plaintiffs herein.

In the case of *Airline Pilots Association v. United Airlines, Inc.*, 802 F.2d 886, 912 (7th Cir. 1986) *cert. denied* 480 U.S. 946 (1987), the Seventh Circuit noted that the RLA applied only to employees "while they are [employed] and subject to the protections of the RLA" and noted that, in order for the RLA to apply, there must be a dispute which "arose within the employer-employee relationship and could therefore be adjudicated under the Act." The Seventh Circuit also held that unless "a person has performed services for the employer under that employer's supervision he is not an employee for purposes of the RLA," and concluded that:

> It would be in direct contravention of the RLA's definition of employee to conclude that a person may become an employee even though he never performed any work for the employer and was never under that employer's direct supervision.[6]

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[6] *Airline Pilots' Association*, 802 F.2d at 913.

That the RLA was never intended by Congress to preemptively apply to independently situated and unrelated parties outside its scope is also apparent from the RLA's definition of an "employee" as a "person in the service of a carrier (subject to its continuing authority to supervise and direct the manner and rendition of his service) who performs any work defined as that of an employee or subordinate official...." 45 U.S.C. § 151 Fifth. It is undisputed in this case that the Plaintiffs were never "in the service of" the Defendants, nor that the Defendants ever had, at any time, any "continuing authority to supervise and direct the manner of rendition of service" by any of the Plaintiffs. Simply stated, the parties in this case were total strangers until the events transpired which led to the legal claims brought by Plaintiffs in the Courts below.

Hawaiian Airlines also made clear that the term "grievances," like disputes over "the interpretation or application" of CBAs, "refers to disagreements over how to give effect to the bargained-for agreement." 114 S.Ct. at p. 2244. Defendants have no internal dispute-resolution processes or adjustment board established by Defendants and its unions that involve or apply to Plaintiffs. *Hawaiian Airlines* noted that the adjustment boards charged with administration of the minor-dispute provisions under the RLA have understood those provisions "as pertaining only to the disputes invoking contract-based rights," i.e., disputes between management and its employees in accordance with the existing and controlling CBA. *Id.* Again, the parties in this case have no "management-employee" relationship and there is no existing or controlling CBA between them, and never has been.

The inordinately harsh result which the extinguishment of Plaintiffs' state-based causes of action creates was never contemplated by Congress in passing the RLA, nor can such an intent be found anywhere in its provisions. To effect a radical expansion of preemption under the RLA to include inde-

pendently situated and unrelated parties having no relationship under the RLA is contrary to Congressional intent, but to do so in such a way that *completely* extinguishes the injured Plaintiffs' sole available remedy under State law is a manifest injustice which must not be countenanced.

B. THIS RADICAL EXPANSION OF PREEMPTION BELOW HAS EFFECTIVELY GRANTED IMMUNITY FROM SUIT TO DEFENDANTS WHO ARE UNRELATED TO THE PLAINTIFFS WHOM THEY HARM

Although the uniform interpretation of CBAs is an important consideration in cases where (unlike here) employers and their employees seek to resolve their grievances, nowhere in the statutory scheme of the RLA did Congress display an intent to expand the scope of Federal preemption to independently situated parties outside the RLA having no labor, employment, statutory or contractual relationship with each other. This is not a labor case and the parties are not in any employer-employee relationship. Uniform interpretation of CBAs is not an issue in this case.

It is clear from the RLA itself that Congress intended the Act to apply only to disputes between "the carrier and the employees thereof," and absent a clearly expressed Congressional intent to the contrary, the statutory language of the RLA should be regarded as conclusively prohibiting the expansion of its purview beyond its stated terms..[7] The restrictive scope of the RLA was never intended to apply beyond its *limited* reach, nor has this Court ever allowed generalized notions of uniform interpretation of labor contracts or CBAs to override the explicit

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[7] *See generally, Consumer Products Safety Commission v. GTE Salvania, Inc.* 477 U.S. 102, 108 (1980); *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234, 1236 (4th Cir. 1984). *cert. denied* 471 U.S. 1116 (1985).

statutory language of the RLA. *See, e.g., Hawaiian Airlines, supra*.[8]

Although there are a few decisions that were relied on below to support the unwarranted extension of Federal preemption in this case (which decisions are discussed *infra*), there is no authority for holding that independently situated and unrelated parties having no labor, statutory, or contractual relationship are subject to the preclusive effect of Federal preemption under the RLA. To hold otherwise would transgress the decisions of this Court, contravene the Congressional intent of the RLA, and leave injured plaintiffs with no remedies. Yet that is precisely what has occurred below.

Indeed, the *Hawaiian Airlines* decision has already had a significant effect on Federal Courts across the country, and has led to a proper return to the restrictive scope of preemption under the RLA. *See, e.g., Felt v. Atchison, Topeka & Santa Fe Railway Co.*, Lexis 19349 (9th Cir. July 25, 1995). The RLA does not preclude or preempt litigation of state-law causes of action by independent parties who possess no statutory relationship under the RLA.

Additionally, no labor policy considerations underlying the RLA are implicated by this case, which involves independent parties unrelated by any labor or contractual relationship. Nor is any fundamental labor policy furthered by granting immunity from suit to independent third parties who tortiously interfere with labor contracts, as the Sixth Circuit succinctly noted in *Dougherty v. Parsec, Inc.*, 872 F.2d 766, 771 (6th Cir. 1989):

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[8] It cannot be overemphasized that the parties in this case are not involved in any contractual or labor dispute, and there is no contractual or labor relationship between them. Plaintiffs are not asserting contract or labor rights against the Defendants. Allowing Plaintiffs' state-based causes of action to proceed against the Defendants will neither affect nor modify the prior contractual relationship between Plaintiffs and their former employer.

> [I]t would not further the policies of either the Congress in enacting the federal labor statutes, or the Supreme Court in *Lueck* [*Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985)] to give a third party who has allegedly interfered with a labor contract what effectively amounts to immunity.'...'Immunity' what be the result if the Court found the claim preempted...Finding that the claim is not preempted would allow the Plaintiff to bring the state law claim in federal court based upon diversity.

Immunity would be the result in this case if the decisions below are sustained and Plaintiffs' claims are found to be preempted. The RLA does not grant immunity to third parties who tortiously interfere with contractual relationships between other parties.

The Colorado Courts below cited five Federal circuit decisions as authority for the proposition that the preclusive effect of RLA-based preemption could be expanded to include the complete extinguishment of State causes of action involving independently situated parties who have no labor or employment relationship under the RLA: *International Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895 (4th Cir. 1992); *Dougherty v. Parsec, Inc.*, 872 F.2d 766 (6th Cir. 1989); *Milne Employees Association v. Sun Carriers, Inc.*, 960 F.2d 1401 (9th Cir. 1991); *Baylis v. Marriott Corp.*, 906 F.2d 874 (2nd Cir. 1990); and *Brotherhood Railway Carmen v. Missouri Pacific R.R. Co.*, 944 F.2d 1422 (8th Cir. 1991).[9]

These cases contain little support for the broad proposition that the scope of Federal preemption under the RLA is intended to expansively apply to unrelated parties in the course of adjudicating state-based causes of action in a fashion that leaves the injured party without a state, federal or administrative remedy.

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[9] Appendix at pp. A-14 through A-15.

The necessity of a remedy was explicitly acknowledged by the Fourth Circuit in the *International Union* case as follows:

> We are cognizant of the apparent paradox, inherent in our decision of this case, holding that Section 301 of the LMRA bars a federal cause of action for tortious interference with contracts, yet simultaneously preempts the identical state law cause of action. *This result is not as harsh as it would initially appear, however, because the Union is not left without a remedy.* First, the Union remains free to bring suit directly against the mining companies for breach of the bargaining agreements. Second, and more closely analogous to the present action, the Union retains the right to proceed against Convenent by means of an unfair labor practice charge before the National Labor Relations Board. *Because an adequate forum exists for resolution of the Unions' claims, we discern no injustice in the finding that Section 301 of the LMRA serves both to bar a federal cause of action for tortious interference with a collective bargaining agreement against a non-signatory of that agreement, and to preempt a similar cause of action premised on state law.*[10]

International Union recognized the "injustice" and the "harsh" result that would have occurred had the party subject to preemption in that case been left without a remedy. Plaintiffs submit that the result in *International Union* would have been significantly different had there been no remedy or forum for the injured party, and certainly would have been decided differently, as would the four other cases cited by the Colorado Courts, in light of this Court's later decision *Hawaiian Airlines*. *International Union* also made the following pertinent observation relative to the issue at bar:

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[10] *International Union*, 977 F.2d at 899-900 [emphasis added].

> While uniform interpretation of collective bargaining agreements is an important consideration in cases where the federal courts have expressly granted jurisdictional authority, nowhere in the statutory scheme did Congress display an intent to make such concerns determinative of the scope of federal jurisdiction. We decline to allow generalized notions of the benefits of uniform federal interpretation of labor contracts to override the explicit statutory language of Section 301 that limits federal jurisdiction to 'suits for violation of [labor] contracts.'[11]

In *Dougherty*, another decision relied on below, the Sixth Circuit *rejected* preemption consistent with the lack of any policy considerations in uniform application of Federal law inherent in cases involving parties unrelated by any labor agreement or CBA:

> One of the basic concerns of the Supreme Court in *Allis-Chalmers v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) was that application of state law to labor contract terms would result in uncertainty in contract negotiations and increase the number of disputes in contract interpretation. *Here, allowing a state law action to proceed against a party who has not signed a labor contract, and whose obligations are not defined by the contract, will neither define nor modify the contractual relationship between the employer or the union...*
>
> Another major policy underlying *Lueck* was the concern that permitting state law claims would allow Plaintiff to avoid the fundamental labor policies that contract disputes should be decided by arbitrators in the first instance. *'That is not a problem where a tortious interference with contract claim is being*

[11] *Id.* at 898.

> *made against a non-signatory' because the non-signatory is not bound by the contract (hence not bound to arbitrate).*[12]

Dougherty further emphasized that "'it would not further the policies of either the Congress in enacting the federal labor statutes, or the Supreme Court in *Lueck*, to give a third party who has allegedly interfered with a labor contract what effectively amounts to immunity,'" and found that immunity would indeed be the result if the Court determined that preemption should be applied. 872 F.2d at 771.

By the same token, the notion of uniform federal interpretation of labor contracts relied on by the Colorado Courts below in preempting Plaintiffs' claims has operated to impermissibly override the explicit statutory language of the RLA that limits its purview to disputes between employers and their employees arising out of existing CBAs, and which was never intended by Congress to operate as a *complete bar* to the ability to redress an actionable injury.

Equally conspicuous by its absence from the holding below was any analysis or consideration of the fact that such a broad expansion of preemption would leave the Plaintiffs without any state, federal or administrative remedy whatsoever, nor was any consideration given to the fact that such an interpretation of Federal preemption would operate to grant the Defendants absolute immunity from liability for their actions. *International Union* expressly noted the existence of separate remedies available to the injured parties, and *Dougherty* rejected any interpretation of preemption that granted immunity to a Defendant. To the extent any of the pre-*Hawaiian Airlines* cases relied on by the Courts below justify the broad expansion of preemption to encompass the Plaintiffs herein, those decisions are contrary to Congressional intent in the RLA, and impermissibly conflict with this Court's decision in *Hawaiian Airlines*.

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[12] *Dougherty*, 872 F.2d at 770-71.[emphasis added].

Such an interpretation of the RLA would remove any real limits on Federal preemption, because, depending on the level of generality, virtually *any* suit against *any* air carrier by *any* injured Plaintiff subject to an unrelated CBA could be viewed as preempted. There would no longer be any outer limits to Federal preemption under the view taken by the Colorado Courts, an expansive interpretation that would bring virtually *all* suits tangentially involving labor into the preclusive arena of Federal preemption, leaving injured Plaintiffs with no rights or remedies and granting absolute immunity to Defendants for their actions.

The "inherent uncertainty" with which some courts have approached the question of Federal preemption, and the inconsistent holdings which have resulted, is no basis for the extinguishment of these Plaintiffs' State-based rights and causes of action. This expansive interpretation of the RLA allows this Federal statute to foreclose the States from providing their Citizens with enforceable legal rights, and it does so by regulating an activity beyond the realm of Congressional intent as defined in the RLA.

Neither this Court nor Congress has ever said that the RLA may reach so far as to displace independent State-based rights and causes of action in a fashion that usurps the traditional province of the States and upsets the Federal balance to such a degree that legitimately injured Citizens are totally deprived of a remedy or a forum to redress their damages. *Hawaiian Airlines* stands for the proposition that application of a broad and expansive version of preemption to extinguish independent rights is impermissible. *Hawaiian Airlines* specifically noted that in *Andrews v. Louisville & N.R. Co.*, 406 U.S. 320 (1972), this "Court held that a state law claim of wrongful termination was preempted, *not* because the RLA broadly preempts state law claims based on discharge or discipline, but because the employee's claim was firmly rooted in a breach of the CBA itself.

He asserted no right independent of that agreement." 114 S.Ct. at 2246 [emphasis in original]. The Court in *Hawaiian Airlines* quoted from the *Andrews* decision the following language:

> "Here it is conceded by all that the *only source* of [Andrews'] right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitled him to damages, is the [CBA]....[T]he disagreement turns on the extent of [the railroads'] obligation to restore [Andrews] to his regular duties following injury in an automobile accident. The existence and extent of such an obligation in a case such as this will depend on the interpretation of the [CBA]. Thus, [Andrews] claim and the [railroad's] disallowance of it, stem from differing interpretations of the [CBA]....His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment."[13]

Here, in contrast, Plaintiffs' CBA with their former employer is not the "only source" of Plaintiffs' rights not to have their contractual obligations tortiously interfered with by unrelated third parties. Indeed, the "only source" of the rights asserted by Plaintiffs in this case is State tort law. Wholly apart from any provision of Plaintiffs' CBA with their former employer, Defendants had an obligation under State law *not* to tortiously interfere with that agreement. If the rulings below are correct, then parties to a CBA have no defense against third party interference. Ever.

There is no interpretation of the RLA which can demonstrate a clear and manifest Congressional intent to create a preclusive regime that broadly preempts substantive protections extended by the States independent of any labor agreement, or which opens the door to third party interference of CBAs with impunity. *Hawaiian Airlines*, 114 S.Ct. at 2245-46. As the

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[13] *Id.* at 2246 [emphasis original].

Court held in *Allis-Chalmers v. Lueck*, 471 U.S. 202, 211-212 (1985):

> Of course, not every dispute concerning employment or tangentially involving a provision of a collective-bargaining agreement is preempted by § 301 or other provisions of the federal labor law...[I]t would be inconsistent with congressional intent...to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

This Court has held that, even where there exists a CBA-based remedy, that does not deprive an employee of independent remedies available under State law. *Hawaiian Airlines*, 114 S.Ct. at 2247 (citing *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988)). The case is even stronger and more compelling in a situation where there is no CBA-based remedy and the parties stand as strangers to each other outside the purview of the RLA or any existing CBA or labor agreement.

C. IT IS AN IMPROPER AND UNWARRANTED EXPANSION OF THE FEDERAL DOCTRINE OF PREEMPTION UNDER THE RLA TO EXTINGUISH STATE-BASED RIGHTS AND LEAVE PLAINTIFFS WITHOUT A REMEDY

Chief Justice Rehnquist succinctly described the "first principles" inherent in balancing the application of Federal statutes and States' rights in *United States v. Lopez*, 115 S.Ct. 1624, 1626 (1995) as follows:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote '[t]he powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the state governments are numerous and indefinite.' This constitutionally mandated division of authority 'was

> adopted by the Framers to insure protection of our fundamental liberties.' 'Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.' [citations omitted]

Noting that "'[f]ederalism serves to assign political responsibility, not to obscure it,'" Justice Kennedy, with whom Justice O'Connor joined and concurred, stated:

> Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.[14]

Although the *Lopez* decision dealt with the undue expansion of Congress' Commerce Clause authority, Justice Kennedy described the whole subject of the Federal and State balance as follows:

> In the past this Court has participated in maintaining the federal balance through judicial exposition of doctrines such as abstention, the doctrine of adequate and independent state grounds, the whole jurisprudence of preemption, and many of the rules governing our habeas jurisprudence.[15]

Hawaiian Airlines sets the tone for the *appropriate* application of Federal preemption under the RLA and consistently keeps preemption narrow and restrictive. *Hawaiian Airlines* requires a determination of the "threshold question whether the

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[14] *Lopez*, 115 S.Ct. at 1638.

[15] *Lopez*, 115 S.Ct. at 1639. [citation omitted]

dispute was subject to the RLA in the first place," a question unequivocally answered in the negative in this case. The all too common tendency of the lower courts to unduly broaden the application of Federal Statutes beyond their terms or authority was conclusively rejected, in different situations, in *Lopez* and *Hawaiian Airlines*. For the past sixty years, this Court has limited the application of Federal preemption under the RLA and now must do so again. Plaintiffs call upon this Court to confirm that Federal preemption under the RLA has real limits that cannot be unduly broadened by the generalized notion that uniformity of application of Federal statutes takes precedence over the rights of the States to grant their Citizens legal remedies and the forums in which to pursue them.

The question submitted in this case is the same one posed by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819):

> The [federal] government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it...is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise as long as our system shall exist.[16]

CONCLUSION

There is no more insidious usurpation of States' rights than the gradual encroachment thereon by an ever-expanding application of Federal statutes. The Federal Government possesses only those enumerated powers which the States have granted it, and at no time, in any statute or portion of Congressional record, can there be found any intent or grant of right to preclusively extinguish state-based causes of action by injured Plaintiffs

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[16] *See, e.g., Lopez*, 115 S.Ct. at 1633 (citing Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819)).

against unrelated Defendants that leaves those Plaintiffs without a state, federal or administrative remedy or a forum.

Plaintiffs pray for the grant of *Certiorari* to review the issues in this case and reverse the Courts below, to enforce the mandate of *Hawaiian Airlines*, and to define Federal preemption under the RLA as intended by Congress.

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COLORADO COURT OF APPEALS June 16, 1994

No. 92CA1657
No. 92CA1723 NOT SELECTED FOR PUBLICATION

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Plaintiffs,

v.

UNITED AIRLINES, INC. a Delaware Corp., RICHARD J. FERRIS, JAMES J. HARTIGAN, DAVID L. PRINGLE and JOHN DOES 1 through 25.

Defendants.

Appeal from the District Court of the City
and County of Denver
Honorable H. Jeffrey Bayless, Judge
No. 88CV13521
No. 88CV13524
No. 88CV16656
No. 88CV16658
No. 88CV21047

Division V JUDGEMENT AFFIRMED

Opinion by JUDGE MARQUEZ
Davidson and Briggs, JJ., concur

Kenneth A. Roberts, P.C., Kenneth A. B. Roberts, Jr., Denver, Colorado; Retrum, Retrum & Donaldson, Craig W. Donaldson, Lakewood, Colorado; Richard S. Shafer, Aurora, Colorado; Waller & Mark, P.C. William C. Waller; Denis H. Mark, Denver, Colorado, for Plaintiffs-Appellants.

Davis, Graham & Stubbs, Dale R. Haris, M. James Grode, Denver, Colorado; O'Melvany & Myers, Chris Hollinger, Robert A. Siegel, Los Angeles, California, for Defendants-Appellees

In this consolidated action, plaintiffs, approximately 775 former employees of Frontier Airlines, Inc. (Frontier), appeal a summary judgment in favor of defendants, United Airlines, Inc. (United), a Delaware Corp., Richard J. Ferris, James J. Hartigan and David L. Pringle. We affirm.

This dispute centers around two contracts involving plaintiffs, Frontier, United, and People Express, Inc. (People). The first contract was entered into on October 17, 1985 (October 1985 Agreement) between People, Frontier and the Frontier unions, of which are generally considered collective bargaining terms. *See* 45 U.S.C. § 151a (1988).

Other sections of this contract address subjects that, according to plaintiffs, are not collective bargaining terms. As stated by plaintiffs, this non-collective bargaining portion was designed to"provide a security package with specific contractual protections for plaintiffs against any restructuring of Frontier or the unapproved sale or disposal of Frontier's assets." Two such provisions provide:

> 9. No Merger - People and Frontier agree that Frontier will not be merged, consolidated or otherwise combined with any other airline, and that Frontier employees will not be merged with employees of any other airline, regardless of otherwise permitted corporate or airline relationship action, and that Frontier will be operated as a separate entity with its own name, colors, and uniforms until at least February 1, 1990.
>
> 12. Sale of Holdings/Airlines/Frontier. People agrees that it will not voluntarily sell or agree to sell all or part of the stock of Frontier, or grant any proxy with respect to the stock of Frontier, or voluntarily take any action with respect to the stock of Frontier, or voluntarily take any action to permit Frontier to issue a material amount of common stock of Frontier,

> or enter into any transaction for the sale, transfer or control of all or a material amount of the assets or business of Frontier, whether by merger, consolidation, or otherwise, directly or indirectly to any air carrier which at the date hereof is operating under the protection of the federal bankruptcy laws or any other affiliate of such a carrier.

In addition, paragraph 11 of the October 1985 agreement restricts the ability of People to sell Frontier's assets. That paragraph provides in pertinent part:

> Based on the existing pool of assets, during the term of this Agreement, Frontier will not sell or otherwise dispose of assets, including sales or dispositions in the ordinary sales or dispositions in the ordinary course of business, in excess of aggregate proceeds of $25 million....
>
> ***
>
> In entering into this Agreement, People intends that Frontier shall be a viable entity, that Frontier be strengthened as an airline, and that Frontier experience profitable growth, and People and Frontier shall make every reasonable effort to accomplish the foregoing. In addition, given profitable growth at Frontier, People shall endeavor and make every reasonable effort to promote and expand both Frontier and People Express Airlines, Inc. at approximately proportional rates.

The second contract was entered into on July 10, 1986, between United and People, and it provided for the sale of Frontier by People to United. Although plaintiffs were not a party to this Agreement, the agreement provides that United's purchase of assets described in the agreement"shall be subject to (1) any approvals of Frontier unions required pursuant to

paragraph 11 of the agreement dated October 17, 1985, between People, Frontier, and the Frontier unions...."

In this action, plaintiffs assert claims for tortious interference with the October 1985 agreement, breach of contract/third party beneficiaries, outrageous conduct, and fraud and misrepresentation.

Previously, United filed motions to dismiss plaintiffs' complaints pursuant to C.R.C.P. § 12(b)(1) and 12(b)(5). United argued that plaintiffs' state law claims were preempted by the Railway Labor Act, 45 U.S.C. § 151, et seq. (1982)(RLA), and these motions were granted. On the prior appeal, a different division of this court held that"absent a determination pursuant to C.R.C.P. 56, we are unable to dispose of the contract issues as a matter of law under the doctrine of preemption,"and reversed and remanded the consolidated actions for further proceedings. However, that division determined that the October 1985 agreement is"in part"a collective bargaining agreement. *See e.g., Brooks v. United Airlines, Inc.*, (Colo. App. No. 89 CA 1572, February 14, 1991)(not selected for publication).

On remand, plaintiffs filed amended complaints and United filed a motion for summary judgment which the trial court granted. The trial court concluded that the October 1985 agreement was an un-severable collective bargaining agreement under the purview of the RLA, that United had standing to assert an RLA-based preemption defense, and that plaintiffs' claims were preempted as a matter of law. We address these issues in order.

I.

Plaintiffs contend that the trial court erred by treating the court of appeals' statement that the October 1985 agreement"is, in part, a collective bargaining agreement"as the law of the case. We disagree.

The pronouncement of an issue in a case presented to it becomes the law of the case. *People v. Roybal,* 672 P.2d 1003 (Colo. 1983). This rule, however, does not extend to matters other than those which in fact were decided upon issues presented and considered in the initial review. *Dando Co. v. Mangini,* 107 Colo. 170, 109 P.2d 1055 (1941).

Here, the determination was made as a matter of law and was designed to guide the trial court on remand. Moreover, we agree with the determination that the October 1985 agreement is, at least in part, a collective bargaining agreement because, as stated in 45 U.S.C. § 151(a) 152 (1988), it is an agreement"concerning rates of pay, rules, and working conditions."

II.

We further conclude that the trial court properly determined that the contract is a whole and is not severable.

The primary objective in the severability inquiry is to ascertain the intent of the contracting parties. The relevant question is whether a number of promises constitute one contract or more than one, and such issue is to be determined by inquiring whether a number of promises constitute one contract or more than one, and such issue is to be determined by inquiring whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever if any promise or set of promises were struck out. *John v. United Advertising, Inc.*, 165 Colo. 193, 439 P.2d 53 (1968).

Here, the trial court ruled that continued labor concessions were the consideration for the promise not to merge or sell off assets of the airline. It further noted that the written contract contained no indication of the intention of the parties for the contract to be severable.

We thus conclude that the trial court properly determined that the contract was not severable.

III.

The dispositive determination thus becomes whether plaintiffs' claims are preempted as a matter of law. We conclude, as did the trial court, that they are preempted.

In determining whether federal preemption exists under the RLA, the federal circuits have turned to the test announced under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a)(1988). *See Baylis v. Marriott Corp.*, 906 F.2d 874 (2d Cir.. 1990); *Beard v. Carrolltron R.R.*, 893 F.2d 117 (6th Cir. 1989).

Under § 301,"if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are states) is preempted...." *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 405-06, 108 S.Ct. 1877, 1881, 100 L.Ed.2d 410, 426 (1988) (*citing Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985)).

The pertinent question in regard to preemption is whether"the state-law claim[s] can be resolved without interpreting the agreement itself." *Lingle v. Norge Division of Magic Chef, Inc. supra,* 486 U.S. at 410, 108 S.Ct. at 1883, 100 L.Ed.2d at 421.

A.

First, however, relying on 45 U.S.C. § 152, which addresses"any dispute between the carrier and the employees thereof,"plaintiffs contend that the Railway Labor Act, by its terms, applies only to collective bargaining issues between an employer and its employees, and not employees of a third party. Plaintiffs assert that the dispute in this action is between United Airlines and former employees of Frontier Airlines and that the RLA precludes preemption. We disagree.

The preemption analysis set fourth in *Lingle* has been applied in cases involving claims against a nonsignatory to a collective bargaining agreement. *See International Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 899 (4th Cir. 1992) ("holding that Section 301 of the LMRA bars a federal cause of action for tortious interference with contract, yet simultaneously preempts the identical state law cause of action:"); *Dougherty v. Parsec, Inc.*, 872 F.2d 766 (6th Cir. 1989) (holding that a state-law claim for tortious interference with a business relationship was not preempted under the *Lingle* test); *see also Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401 (9th Cir. 1991) (holding that a non-signatory to a CBA has standing to remove a case on the basis of section 301 preemption if resolution of the state law claim requires interpretation of the collective bargaining agreement and, then, applying the *Lingle* test to the state-law claims raised); *Baylis v. Marriott Corp., supra* (holding that a state-law claim for tortious inducement or breach of contract was preempted); *Brotherhood Railway Carmen v. Missouri Pacific R.R. Co.*, 944 F.2d 1422 (8th Cir. 1991) (holding that tortious interference claims was preempted).

Further, we conclude that United has standing to raise this defense.

Because of our resolution of this issue, we need not address plaintiffs' claim that the trial court erred by applying the law of the case doctrine to conclude that United has standing to raise a preemption defense.

B.

We now turn to plaintiffs' claims and apply the *Lingle* test. Here, plaintiffs' first claim for relief is for intentional interference with contractual relations.

This tort has been defined as follows:

> One who intentionally and improperly interferes with the performance of a contractbetween another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Memorial Gardens, Inc. v. Olympian Sales & Management Consultants, Inc., 690 P.2d 207, 210 (Colo. 1984); *See Dougherty v. Parsec, Inc., supra.*

In their amended complaints, plaintiffs allege that United tortiously interfered with the October 1985 agreement by"wrongfully converting indispensable Frontier assets with the intended and foreseeable result that plaintiffs would be irreparably damaged." Plaintiffs further contend that"[b]y wrongfully obtaining Frontier's key assets, and then reneging on the Agreement [presumably the July 1986 Agreement] to purchase the stock and integrate the employees, United destroyed all Frontier operations and assure the nonexistence of the jobs of the plaintiffs." In plaintiffs' response to United's motion for summary judgment on the issues of preemption, they contend that United tortiously interfered with the October 1985 agreement by inducing People to violate the agreement.

The underlying basis for the claim appears to be that People sold Frontier's assets to United either because 1) United tortiously induced People to enter into the July 1986 agreement and fraudulently induced plaintiffs to approve the agreement which resulted in a violation of plaintiffs' rights under the October 1985 agreement; or 2) United tortiously induced People to enter into the July 1986 agreement and without obtaining plaintiffs' approval, in violation of plaintiffs' rights under the October 1985 agreement.

In either case, plaintiffs' rights under this claim for relief stem from those terms of the October 1985 agreement which

define or integrally involve plaintiffs' working conditions and consideration provided for plaintiffs' acceptance of those working conditions. In our view, the state-law claim could not be determined without deciding plaintiffs' continuing rights and obligations under the October 1985 agreement.

Moreover, plaintiffs' claim ultimately requires a determination of the continuing validity of the October 1985 agreement. We recognize that this presents a different question than that of interpreting the meaning of the term in an admittedly valid collective-bargaining agreement. However, the supreme court in *Lingle v. Norge Division of Magic Chef, Inc., supra*, again confirmed that the underlying rationale in preempting state-law claims is to avoid inconsistent results under collective-bargaining agreements.

In the usual case, the validity of the agreement is not in question and the issue is whether the state-law claims depends upon the meaning of terms contained in the admittedly valid agreement. However, when the state-law claim depends upon a determination of the very validity of the collective bargaining agreement, inconsistent results are no less a concern.

We therefore conclude that, in the unusual circumstances presented here, because the state-law claim would in effect depend on our determination of the validity of the July 1986 agreement, which in turn would, in effect, determine the continuing validity of the October 1985 agreement, pre-emption is equally appropriate.

C.

Plaintiffs' second claim for relief is for "Breach of Contract / Third Party Beneficiaries."

The July 1986 agreement provides:

> 2. The foregoing transaction is subject to the conclusion by no later than July 31, 1986, subject to

> ratification by the unions if required, by August 31,1 986, of agreement satisfactory to United with labor unions representing its employees and the employees of Frontier, concerning the terms and conditions applicable to United's acquisition and operation of Frontier. United agrees to use its best efforts to obtain such agreements.

In addition, United's purchase of assets under the July 1986 agreement was"subject to (1) any approvals of Frontier unions required pursuant to paragraph 11 of the agreement dated October 17, 1985."

To determine whether United breached the July 10, 1986 agreement requires an interpretation of the October 17, 1985 agreement.

Thus, we conclude that this claim is also preempted.

D.

Plaintiffs' third claim for relief is for intentional infliction of emotional distress and extreme and outrageous conduct.

Outrageous conduct is committed if, by extreme and outrageous conduct, an individual intentionally or recklessly causes severe emotional distress to another. *Rubenstein v. Sough Denver National Bank,* 762 P.d 755 (Colo. App. 1988); *CJI Civ.3d* 23:1 (1989). To qualify as outrageous, the offending conduct must go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. *Churchey v. Adolph Coors*, 759 P.2d 1336 (Colo. 1988); *CJI Civ. 3d* 23:2 (1989).

In their amended complaints, plaintiffs claim that United's"acts and/or omissions and other wrongful conduct"amount to extreme and outrageous conduct. Plaintiffs do not specify particulars concerning the outrageous conduct except by incorporating previous allegations under this claim.

However, as the trial court noted:

> Plaintiffs in this case are not able to state the elements of their claim for outrageous conduct without reference to the October 17, 1985 contract. What plaintiffs are alleging, in essence, is that the outrageous act was obtaining Frontier's corporate operational assets. Even if true such action standing alone is not outrageous. It may become outrageous only in relation to a contract which prohibits such action. Therefore, under the unique facts of this case the claim of outrageous conduct would of necessity call for an interpretation of the October 17, 1985 contract.

Because the conduct here involves interpretation of a collective bargaining term, we conclude that plaintiffs' claim is preempted.

E.

In their fourth claim for relief, plaintiffs contend that United induced plaintiffs to accept and agree to the July 1986 agreement with fraudulent representations that United would not only purchase the assets of Frontier but also its stock, and would continue the business and thereby protect Frontier's employees.

The elements of fraud include: (1) a false representation of a material existing fact; (2) knowledge on the part of the one making the representation that it is false; (3) ignorance on the part of the one to whom the representation is made of the falsity; (4) intention by the one making the representation that it be acted upon; (5) and action on the representation resulting in damage. *Kinsey v. Preeson*, 746 P.2d 542 (Colo. 1987). Moreover,"[i]n all averments of fraud or mistake, the circumstances continuing fraud or mistake shall be stated with particularity." C.R.C.P. 9(b).

The crux of this claim for relief is that United used fraud or misrepresentations to induce plaintiffs' approval as required by the July 1986 agreement. Without plaintiffs' approval or waiver, the sale would violate both the October 1985 agreement and the July 1986 agreement.

Under the fifth requirement, plaintiffs must act on representation. Here, plaintiffs claim requires interpretation of the October 1985 agreement and, thus, is preempted.

The judgment is affirmed.

JUDGE DAVIDSON and JUDGE BRIGGS concur.

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC467
CERTIORARI TO THE COLORADO COURT OF APPEALS,
NO. 92CA1657 & 92CA1732
DISTRICT COURT, CITY AND COUNTY OF DENVER,
NO. 88CV13521
NO. 88CV13524, NO. 88CV16656, NO. 88CV16658,
NO. 88CV21047

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Petioners,

v.

UNITED AIRLINES, INC. a Delaware Corp., RICHARD J. FERRIS, JAMES J. HARTIGAN, DAVID L. PRINGLE and JOHN DOES 1 through 25.

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgement of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is DENIED.

BY THE COURT, EN BANC, MARCH 20, 1995.
JUSTICE SCOTT does not participate.

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(2)

Supreme Court, U.S.
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No. 95-282

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ROGER O. BROOKS, et al.,
Petitioners,

VS.

UNITED AIRLINES, INC.,
Respondent.

On Petition For Writ of Certiorari To The Colorado Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The only appellee before the Colorado Court of Appeals was Defendant-Respondent United Airlines, Inc. With respect to the three individuals identified as respondents in the Petition for Writ of Certiorari filed in this Court (i.e., Richard J. Ferris, James J. Hartigan and David L. Pringle), the Colorado Court of Appeals entered an Order on June 1, 1993 stating that those three individuals "are not parties to this appeal." The Petitioners did not seek review of that Order, which is reprinted in the Appendix hereto at page A-1.

The corporate parent of Defendant-Respondent United Airlines, Inc. is UAL Corporation. There are the following subsidiaries: Four Star Insurance Company, Ltd.; Mileage Plus, Inc.; UAL Leasing Corporation; Air Wis Services, Inc.; Air Wisconsin, Inc.; United Airlines Credit Corporation; United Aviation Fuels Corporation; Kion De Mexico, S.A. de C.V.; United Cogen. Inc.; United Vacations, Inc.; Covia Corporation; United Worldwide Corporation; and Cypher Corporation.

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No. 95-282

In The

Supreme Court Of The United States

October Term, 1995

Roger O. Brooks, et al.,
Petitioners,

v.

United Airlines, Inc.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendant-Respondent United Airlines, Inc. ("United") hereby submits the following brief in opposition to the Petition for Writ of Certiorari filed by Plaintiffs-Petitioners Roger O. Brooks et al. ("plaintiffs") in the above-captioned matter.

OPINIONS AND ORDERS IN THE COURTS BELOW

There are no reported opinions or orders in this case. The opinion of the Colorado Court of Appeals, not selected for publication, is reprinted in the Appendix hereto at pages A-2 through A-18. United has reprinted the lower court's opinion in an Appendix to this Brief in Opposition because the opinion as reprinted in the Appendix to the Petition for Writ of Certiorari contained numerous typographical mistakes and omissions of text.

JURISDICTION

The Colorado Court of Appeals entered its opinion on June 16, 1994. That court entered an Order denying the plaintiffs' Petition for Rehearing on July 14, 1994. The statutory basis for this Court's jurisdiction to review on a writ of certiorari the decision of the Colorado Court of Appeals is 28 U.S.C. § 1257(a). The suggestion in the Petition for Writ of Certiorari that this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) is incorrect.

SUMMARY OF ARGUMENT

It is a well-recognized principle that federal labor law preempts state-law claims which would require the interpretation of a collective bargaining agreement. See Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 413 (1988). This Court's decision in Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 2239 (1994), removed any doubt as to

the applicability of Lingle, decided under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, to cases involving preemption under the Railway Labor Act, 45 U.S.C. §§ 151 et seq. It is indisputable that the Colorado Court of Appeals applied the Lingle standard in this case. As a result, the Colorado court's decision poses no conflict with the decision in Hawaiian Airlines or with any other decision of this Court.

As required by Lingle, the Colorado Court of Appeals analyzed the elements of each of the plaintiffs' causes of action under Colorado law in light of the specific circumstances of this case. The court concluded that each of the plaintiffs' state-law claims was dependent on a disputed interpretation of the October 17, 1985 collective bargaining agreement, in particular, on the meaning of the agreement's restrictions on asset transactions and other job-security provisions. The plaintiffs do not challenge that determination in this Court. The Colorado Court of Appeals concluded that the plaintiffs' claims were preempted by the Railway Labor Act, and, in so ruling, correctly applied the Lingle standard to the plaintiffs' claims in this case.

The plaintiffs contend that an exception to the Lingle doctrine should be created in this case because United was not a signatory to the October 17, 1985 collective bargaining agreement on which all of the plaintiffs' state-law claims are based. The plaintiffs' position finds no support in this Court's precedents.

Moreover, there is a long line of federal circuit court decisions holding, on the authority of Lingle, that state-law claims against a non-signatory to a collective bargaining agreement are preempted if those claims would require an interpretation of the labor agreement. Because the Court in Hawaiian Airlines expressly approved the Lingle standard, nothing in the Court's decision in Hawaiian Airlines called into question those circuit court decisions on which the Colorado Court of Appeals relied in this case. Those decisions were correctly decided: the rationale for the preemption doctrine, i.e., to promote uniformity and predictability in the meaning of collective bargaining agreements, is equally applicable whether or not one of the litigants is a signatory to the labor agreement.

The plaintiffs' asserted lack of an alternative remedy does not change the analysis. The doctrine of preemption addresses whether state or federal law governs a particular subject, and it is well-established that federal law governs the enforcement of rights based on, or dependent on the interpretation of, a collective bargaining agreement. The question of what remedy is available under the controlling law, in this case federal law, is separate and distinct from the question of which law is applicable. It is also a question that is not before this Court because the plaintiffs never even attempted to invoke an alternative remedy under federal law.

In addition to the above reasons, this is an inappropriate case for the Court's review because the decision of the Colorado court was not selected for official publication, and therefore cannot possibly create any confusion among the lower courts, and because this case presents at most an alleged "misapplication of a properly stated rule of law" which "rarely" supports the grant of a petition. Sup. Ct. R. 10.

ARGUMENT

I. THE DECISION OF THE COLORADO COURT OF APPEALS IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN HAWAIIAN AIRLINES, INC. V. NORRIS AND WITH THIS COURT'S OTHER PREEMPTION DECISIONS.

One of the "compelling reasons" to grant a petition for writ of certiorari is when "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The plaintiffs attempt to invoke that principle in this case. See, e.g., Petition for Writ of Certiorari ("Petition") at 4 (asserting that the decision of the Colorado Court of Appeals is "in direct contravention of this Court's decisions spanning six decades and culminating in Hawaiian Airlines"). However, as will be demonstrated below, the plaintiffs' argument is based on an inaccurate and incomplete description of this Court's decision in Hawaiian

Airlines, Inc. v. Norris ("Hawaiian Airlines"), 114 S. Ct. 2239 (1994). Upon a thorough examination of the decision in Hawaiian Airlines, it is clear that the ruling of the Colorado Court of Appeals is entirely consistent with this Court's decision.

The issue in Hawaiian Airlines was what standard should be applied in deciding whether the Railway Labor Act, 45 U.S.C. §§ 151 et seq., preempts a state-law claim. At the time of its decision in Hawaiian Airlines, the Court had not decided a case involving preemption of state-law claims by the Railway Labor Act since its 1972 decision in Andrews v. Louisville & Nashville Railroad, 406 U.S. 320 (1972). However, the Court had issued a number of decisions involving preemption under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185.[1] See, e.g., Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988); International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851 (1987); and Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). In Lingle, the Court held that Section 301 preempts the application of state law where the state-law claim would require the interpretation of a collective bargaining agreement. Lingle, 486 U.S. at 413.

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[1] The Labor-Management Relations Act does not apply to an employer subject to the Railway Labor Act or to an employee of any such employer. See 29 U.S.C. §§ 152(2), (3).

Prior to the Court's decision in Hawaiian Airlines, some federal circuit courts had ruled that Railway Labor Act preemption was governed by the Lingle standard and that the Railway Labor Act therefore preempted only those state-law claims which would require the interpretation of a collective bargaining agreement. See, e.g., Anderson v. American Airlines, Inc., 2 F.3d 590, 595-596 (5th Cir. 1993); Davies v. American Airlines, Inc., 971 F.2d 463, 466-467 (10th Cir. 1992), cert. denied, 113 S. Ct. 2439 (1993). However, other courts had ruled that Railway Labor Act preemption was not limited to cases covered by the Lingle standard but also was applicable to preempt state-law claims which were founded upon some incident of the employment relationship independent of the terms of a collective bargaining agreement. See, e.g., Lorenz v. CSX Transp., Inc., 980 F.2d 263, 268 (4th Cir. 1992); Hirras v. National R.R. Passenger Corp., 10 F.3d 1142, 1145 (5th Cir.), vacated, 114 S. Ct. 2732 (1994).

The Court in Hawaiian Airlines resolved this conflict among the lower courts, and held that the proper standard for Railway Labor Act preemption is the Lingle standard for cases involving preemption under Section 301. As the Court explained, "we conclude that Lingle provides an appropriate framework for addressing pre-emption under the RLA, and we adopt the Lingle standard to resolve claims of RLA pre-emption." Hawaiian Airlines, 114 S. Ct. at 2249.

Although the decision of the Colorado Court of Appeals was issued on June 16, 1994 (see infra at A-2), four days before this Court's decision in Hawaiian Airlines, the opinion of the Colorado court indisputably establishes that the mandate of Hawaiian Airlines--to apply the Lingle standard in cases involving preemption under the Railway Labor Act--was followed:

> "In determining whether federal preemption exists under the RLA, the federal circuits have turned to the test announced under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) (1988). [Citations omitted.]
>
> * * *
>
> "The pertinent question in regard to preemption is whether 'the state-law claim[s] can be resolved without interpreting the agreement itself.' Lingle v. Norge Division of Magic Chef, Inc., supra, 486 U.S. at 410, 108 S. Ct. at 1883, 100 L. Ed. 2d at 421." Infra at A-9.[2]

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[2] Because its opinion makes clear that the Colorado Court of Appeals applied the Lingle standard in this case, it would be inappropriate for this Court to remand for reconsideration in light of Hawaiian Airlines, and the plaintiffs have not requested such relief.

Despite the foregoing, the plaintiffs contend that the decision of the Colorado Court of Appeals is an example of the "pervasive preemption" that was rejected by this Court in Hawaiian Airlines. See Petition at 5-6. This contention is without merit. The Court's rejection of "pervasive preemption" was in reference to the broad view of Railway Labor Act preemption, previously adopted by some lower courts, under which state-law claims were preempted even if the claims did not require interpretation of a collective bargaining agreement. See Hawaiian Airlines, 114 S. Ct. at 2245 n.5. However, as demonstrated above, the Colorado Court of Appeals did not adopt this broad view of Railway Labor Act preemption; rather, the Colorado court expressly applied the Lingle standard.

The plaintiffs also repeatedly assert that this Court's decision in Hawaiian Airlines narrowed the scope of Railway Labor Act preemption. See Petition at 5, 12, 17, and 20. However, the plaintiffs' reliance on the clarification of the scope of Railway Labor Act preemption effectuated by Hawaiian Airlines is misplaced. The Court's decision in Hawaiian Airlines only signified a change in the law to the extent a particular state or circuit court had previously applied a more expansive standard of preemption in Railway Labor Act cases than the standard for Section 301 cases set forth in Lingle. In such jurisdictions, Hawaiian Airlines surely did result in a narrowing of the scope of Railway Labor Act preemption. See, e.g., Felt v. Atchison, T. & S.F. Ry., 60 F.3d 1416, 1420 (9th Cir. 1995); Westbrook v. Sky Chefs, Inc.,

35 F.3d 316, 317-318 (7th Cir. 1994); Harris v. Hirsh, 654 N.E.2d 975 (N.Y. Ct. App. 1995). However, the lower court's opinion makes clear that Colorado is not one of those jurisdictions.

The Colorado Court of Appeals applied the standard articulated by the Court in Lingle to the circumstances of this case, and Hawaiian Airlines clearly did not modify or narrow the Lingle standard. See Hawaiian Airlines, 114 S. Ct. at 2249. There is nothing in the Court's opinion in Hawaiian Airlines that calls into question any of the federal circuit court decisions applying the Lingle standard on which the Colorado Court of Appeals relied in this case, and the plaintiffs' assertions to the contrary are incorrect.[3] See Petition at 14, 16.

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[3] Indeed, the plaintiffs did not even cite Hawaiian Airlines in their Petition for Rehearing before the Colorado Court of Appeals or in their Petition for Certiorari before the Colorado Supreme Court. The plaintiffs mentioned Hawaiian Airlines for the first time in their Reply Brief filed with the Colorado Supreme Court after United cited this Court's decision in its Brief in Opposition to Petition for Certiorari.

II. NEITHER UNITED'S STATUS AS A NON-SIGNATORY TO THE COLLECTIVE BARGAINING AGREEMENT NOR THE PLAINTIFFS' ALLEGED LACK OF AN ALTERNATIVE REMEDY JUSTIFIES A DEPARTURE FROM THIS COURT'S PREEMPTION PRECEDENTS.

The Colorado Court of Appeals held that all of the plaintiffs' state-law claims were dependent on a disputed interpretation of the October 17, 1985 collective bargaining agreement. The plaintiffs do not challenge that determination, and, as previously noted, such a determination ordinarily would be dispositive of the preemption issue under the standard set forth in this Court's precedents.

The plaintiffs, however, insist that "[t]he facts and issues of this case are uniquely qualified for certiorari review because this is the first instance that preemption under the RLA has been radically expanded to preclude state-based claims in a case involving unrelated (non-RLA) parties who have no labor or employment relationship, in a fashion that leaves the injured parties wholly without remedy or recourse under law." Petition at 3. See also id. at 10-11. The plaintiffs' characterization of the decision of the Colorado Court of Appeals as a radical departure from existing preemption caselaw is, however, totally inaccurate. Rather, in light of the relevant caselaw and the rationale for the preemption doctrine, United's status as a non-

signatory to the labor agreement and the plaintiffs' alleged lack of an alternative remedy do not justify a departure from this Court's preemption precedents.

The plaintiffs have not cited a single decision in which this Court held that a state-law claim, which was dependent on an interpretation of a collective bargaining agreement, was not preempted because the defendant was a non-signatory to the collective bargaining agreement or because the plaintiff would allegedly have no alternative remedy in the event the state-law claim was barred. Such an argument should be foreclosed by this Court's decision in Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962). In that case, the employer asserted a state-law cause of action for tortious interference with contract against 24 individual employees who had induced their co-workers to engage in a strike in violation of a no-strike clause in a collective bargaining agreement. The Court first held that the employer's state-law tort claim against its employees was preempted by Section 301, and then held that, as a matter of federal law, there was no cause of action against the employees for tortiously inducing their co-workers to violate the contractual obligation not to strike. Atkinson, 370 U.S. at 246-249. The result of the Court's decision was that the defendants were immune from liability for acts tortious under state law. See Sinclair Ref. Co. v. Atkinson, 290 F.2d 312, 319 (7th Cir. 1961). However, such immunity did not render the preemption doctrine inapplicable in Atkinson, and United's alleged immunity

likewise does not render preemption inapplicable in this case. See Petition at 11-19.

The plaintiffs' argument is also foreclosed by a long line of federal circuit court decisions, under the Railway Labor Act and Section 301, holding--without regard to whether or not a plaintiff would have an alternative remedy--that state-law claims against a non-signatory to a collective bargaining agreement are preempted where those claims would require an interpretation of the labor agreement. See infra at A-10 through A-11 (citing Brotherhood Railway Carmen v. Missouri Pac. R.R., 944 F.2d 1422 (8th Cir. 1991) (Railway Labor Act); Baylis v. Marriott Corp., 906 F.2d 874 (2d Cir. 1990) (same); Milne Employees Ass'n v. Sun Carriers, Inc., 960 F.2d 1401 (9th Cir. 1992), cert. denied, 113 S. Ct. 2927 (1993) (Section 301); International Union, United Mine Workers v. Covenant Coal Corp., 977 F.2d 895 (4th Cir. 1992) (same)).[4] In fact, in two of those cases, the courts

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[4] The Section 301 decisions cited by the Colorado Court of Appeals expressly relied on the Lingle standard. See Milne Employees Ass'n, 960 F.2d at 1407-1408; Covenant Coal Corp., 977 F.2d at 899; and Dougherty v. Parsec, Inc., 872 F.2d 766, 767-770 (6th Cir. 1989). In the two Railway Labor Act decisions cited by the Colorado court, the courts ruled, consistent with Lingle, that the state-law claims were preempted because those claims would require an interpretation of the collective bargaining agreement. See Brotherhood Railway Carmen, 944 F.2d at 1430; Baylis, 906 F.2d at 877. The Second Circuit

(continued...)

held that the plaintiff's state-law claim was preempted while expressly acknowledging that the plaintiff did not have an alternative federal remedy against the non-signatory. See Baylis, 906 F.2d at 875, 877-878; Covenant Coal Corp., 977 F.2d at 899-900. The plaintiffs, on the other hand, have failed to cite a single decision in which a federal circuit court held that a state-law claim which would require the interpretation of a collective bargaining agreement was not preempted because the defendant was a non-signatory or because the plaintiff allegedly did not have an alternative remedy.[5]

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[4](...continued)
recently observed that, to the extent its prior decision in Baylis contained any statements suggesting that Railway Labor Act preemption was broader than preemption under Section 301, those statements were no longer correct in light of Hawaiian Airlines. See Gay v. Carlson, 60 F.3d 83, 87 (2d Cir. 1995).

[5] The plaintiffs rely heavily on statements from the decision in Dougherty v. Parsec, Inc., 872 F.2d 766, 770-771 (6th Cir. 1989), to the effect that the preemption doctrine should generally be inapplicable in lawsuits against a non-signatory. See Petition at 12-13, 15-16. However, the basis for the Sixth Circuit's no-preemption holding in Dougherty was that, under Ohio law, it was not necessary to interpret the collective bargaining agreement to adjudicate the plaintiff's claim for tortious interference with contract. Id. at 770. The court's statements about the defendant's status as a non-signatory were dictum. Indeed, in subsequent decisions the Sixth Circuit has held that state-law claims against non-signatories are preempted
(continued...)

The above-described decisions are analytically correct. The question of whether or not an employee covered by a Railway Labor Act collective bargaining agreement has a remedy against a third party for that person's alleged involvement in the violation of the employee's rights under the labor agreement is a question that must be answered as a matter of federal law. International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682, 691-692 (1963). See also Andrews v. Louisville & N. R.R., 406 U.S. 320, 323 (1972); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-457

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[5](...continued)
where, under the applicable state tort law, it would be necessary to interpret the underlying labor agreement. See, e.g., DeCoe v. General Motors Corp., 32 F.3d 212, 217-218 (6th Cir. 1994) (distinguishing Dougherty on the ground that Ohio tort law did not require proof of breach of the underlying contract).

The plaintiffs also rely on the Fourth Circuit's discussion in Covenant Coal Corp. of the availability of alternative remedies. See Petition at 14. However, there is nothing in the court's opinion to indicate that its finding of preemption was based on the existence of an alternative remedy. In any event, the Fourth Circuit specifically noted that one alternative remedy was for the union to bring suit directly against the signatories for breach of the labor agreement. See Covenant Coal Corp., 977 F.2d at 899. The plaintiffs in this case had the right under the Railway Labor Act to pursue, directly against their employer, their claims for breach of the collective bargaining agreement's job-security provisions, and the record will show that many did so.

(1957); and Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102-104 (1962). The plaintiffs' asserted lack of an alternative remedy under federal law for the alleged breach of their job-security rights is, even if true, irrelevant to the preemption inquiry. The doctrine of preemption determines whether state or federal law governs a particular subject. The question of what remedy is available under the controlling federal law is a separate and distinct question which has no bearing on the preemption inquiry. See, e.g., Atkinson v. Sinclair Refining Co., 370 U.S. 238, 247 n.6 (1962) ("Our holding, however, is that the suit is a § 301 suit; whether there is a claim upon which relief can be granted is a separate question.").[6]

The federal circuit court decisions discussed above, and the decision of the Colorado Court of Appeals in the present case, are also fully consistent with the policy behind federal preemption of state-law claims that are dependent on an interpretation of the labor agreement. That policy is to promote uniformity and predictability in the meaning of contract terms and to avoid the confusion of subjecting the same contract language to construction by courts in all 50 states. As this Court has observed:

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[6] The question of whether the plaintiffs have an alternative remedy under federal law is not before this Court because the plaintiffs have chosen not to attempt to invoke the Railway Labor Act or any other federal law as a basis for recovery.

> "More important, the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. . . ." Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-104 (1962) (citations omitted), quoted with approval in Lingle, 486 U.S. at 404 n.3. See also Lingle, 486 U.S. at 405-406; Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985).

Given the rationale for preemption, the status of a defendant as a non-signatory to the collective bargaining

agreement or the absence of an alternative remedy is not controlling as to the applicability of the doctrine. The application of state law to the terms of a labor agreement frustrates uniformity of meaning whether or not a litigant has other avenues of relief or has signed the collective bargaining agreement.

In light of the foregoing, it is misleading for the plaintiffs to characterize the decision of the Colorado Court of Appeals as a radical departure from existing law. Rather, there is ample authority for the application of the preemption doctrine to claims against a non-signatory, including in situations where a plaintiff allegedly would have no alternative to the state-law remedy. Accordingly, there is no need for this Court to review the lower court's decision.

III. THERE ARE ADDITIONAL REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI.

In addition to the above reasons, this is an inappropriate case for the Court's review because the opinion of the Colorado Court of Appeals was not selected for official publication and therefore cannot be cited in the Colorado courts except in limited circumstances not relevant here. Thus, even if the Colorado court's opinion were incorrect--which it is not--the opinion still would not create any confusion among the lower courts as to the proper application of this Court's preemption precedents.

Moreover, because it is indisputable that the Colorado Court of Appeals applied the correct legal standard, i.e., the Lingle standard, to the plaintiffs' claims in this case, the Petition presents at most a "misapplication of a properly stated rule of law." A petition for writ of certiorari is "rarely granted" in such circumstances. Sup. Ct. R. 10.

The Colorado Supreme Court did not believe this case was worthy of certiorari review. See Petition at A-29. United respectfully submits that this Court should reach the same conclusion.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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COLORADO COURT OF APPEALS **ORDER**
No. 92CA1657 and 92CA1732

Roger O. Brooks, et al.,

Plaintiff-Appellants,

v.

United Airlines, Inc., et al.,

Defendant-Appellees.

The court, having considered the response to its order dated May 20, 1993,

ORDERS that Richard J. Ferris, James J. Hartigan and David L. Pringle are not parties to this appeal. The amended motion for extension of time to file answer brief is GRANTED to and including June 4, 1993.

BY THE COURT

Dated: June 1, 1993

Copies to: Counsel of Record ag/sa

COLORADO COURT OF APPEALS June 16, 1994
No. 92CA1657
No. 92CA1723 NOT SELECTED FOR PUBLICATION

[Caption Pages Intentionally Omitted]

Appeal from the District Court of the City and County of Denver

Honorable H. Jeffrey Bayless, Judge

No. 88CV13521
No. 88CV13524
No. 88CV16656
No. 88CV16658
No. 88CV21047

Division V JUDGMENT AFFIRMED
Opinion by JUDGE MARQUEZ
Davidson and Briggs, JJ., concur

Kenneth A. Roberts, P.C., Kenneth A.B. Roberts, Jr., Denver, Colorado; Retrum, Retrum & Donaldson, Craig W. Donaldson, Lakewood, Colorado; Richard A. Winkel, Denver, Colorado; Richard S. Shafer, Aurora, Colorado;

Waller & Mark P.C., William C. Waller, Denis H. Mark, Denver, Colorado, for Plaintiffs-Appellants

Davis, Graham & Stubbs, Dale R. Harris, M. James Grode, Denver, Colorado; O'Melveny & Myers, Chris Hollinger, Robert A. Siegel, Los Angeles, California, for Defendants-Appellees

In this consolidated action, plaintiffs, approximately 775 former employees of Frontier Airlines, Inc. (Frontier), appeal a summary judgment in favor of defendants, United Airlines, Inc. (United), a Delaware Corp., Richard J. Ferris, James J. Hartigan and David L. Pringle. We affirm.

This dispute centers around two contracts involving plaintiffs, Frontier, United, and People Express, Inc. (People). The first contract was entered into on October 17, 1985 (October 1985 agreement) between People, Frontier, and the Frontier unions, of which plaintiffs are members. A portion of this agreement addressed rates of pay, rules, or working conditions, which are generally considered collective bargaining terms. See 45 U.S.C. §151a (1988).

Other sections of this contract address subjects that, according to plaintiffs, are not collective bargaining terms. As stated by plaintiffs, this non-collective-bargaining portion was designed to "provide a security package with

specific contractual protections for plaintiffs against any restructuring of Frontier or the unapproved sale or disposal of Frontier's assets." Two such provisions provide:

> 9. No Merger. People and Frontier agree that Frontier will not be merged, consolidated or otherwise combined with any other airline, and that Frontier employees will not be merged with employees of any other airline, regardless of otherwise permitted corporate or airline relationship action, and that Frontier will be operated as a separate entity with its own name, colors, and uniforms until at least February 1, 1990.
>
> 12. Sale of Holdings/ Airlines/ Frontier. People agrees that it will not voluntarily sell or agree to sell all or part of the stock of Frontier, or grant any proxy with respect to the stock of Frontier, or voluntarily take any action or agree not to take any action with respect to the stock of Frontier, or voluntarily take any action to permit Frontier to issue a material amount of common stock of Frontier, or enter into any transaction for the sale, transfer or control of all or a material amount of the assets or business of Frontier, whether by merger, consolidation, or otherwise, directly

> or indirectly to any air carrier which at the date hereof is operating under the protection of the federal bankruptcy laws or any affiliate of such a carrier.

In addition, paragraph 11 of the October 1985 agreement restricts the ability of People to sell Frontier's assets. That paragraph provides in pertinent part:

> Based on the existing pool of assets, during the term of this Agreement, Frontier will not sell or otherwise dispose of assets, including sales or dispositions in the ordinary course of business, in excess of aggregate proceeds of $25 million . . . .
>
> . . . .
>
> In entering into this Agreement, People intends that Frontier shall be a viable entity, that Frontier be strengthened as an airline, and that Frontier experience profitable growth, and People and Frontier shall make every reasonable effort to accomplish the foregoing. In addition, given profitable growth at Frontier, People shall endeavor and make every reasonable effort to promote and expand both Frontier and People Express Airlines, Inc. at approximately proportional rates.

The second contract was entered into on July 10, 1986, between United and People, and it provided for the sale of Frontier by to United. Although plaintiffs were not a party to this agreement, the agreement provides that United's purchase of assets described in the agreement "shall be subject to (1) any approvals of Frontier unions required pursuant to paragraph 11 of the agreement dated October 17, 1985, between People, Frontier, and the Frontier unions. . . ."

In this action, plaintiffs assert claims for tortious interference with the October 1985 agreement, breach of contract/third party beneficiaries, outrageous conduct, and fraud and misrepresentation.

Previously, United filed motions to dismiss plaintiffs' complaints pursuant to C.R.C.P. 12(b)(1) and 12(b)(5). United argued that plaintiffs' state law claims were preempted by the Railway Labor Act, 45 U.S.C. §151, et seq. (1982) (RLA), and these motions were granted. On the prior appeal, a different division of this court held that "absent a determination pursuant to C.R.C.P. 56, we are unable to dispose of the contract issue as a matter of law under the doctrine of preemption," and reversed and remanded the consolidated actions for further proceedings. However, that division determined that the October 1985 agreement is "in part" a collective bargaining agreement. See, e.g., Brooks v. United Airlines, Inc., (Colo. App. No. 89CA1572, February 14, 1991) (not selected for official publication).

On remand, plaintiffs filed amended complaints and United filed a motion for summary judgment which the trial court granted. The trial court concluded that the October 1985 agreement was an un-severable collective bargaining agreement under the purview of the RLA, that United had standing to assert an RLA-based preemption defense, and that plaintiffs' claims were preempted as a matter of law. We address these issues in order.

I.

Plaintiffs contend that the trial court erred by treating the court of appeals' statement that the October 1985 agreement "is, in part, a collective bargaining agreement" as the law of the case. We disagree.

The pronouncement of an appellate court on an issue in a case presented to it becomes the law of the case. People v. Roybal, 672 P.2d 1003 (Colo. 1983). This rule, however, does not extend to matters other than those which in fact were decided upon issues presented and considered in the initial review. Dando Co. V. Mangini, 107 Colo. 170, 109 P.2d 1055 (1941).

Here, the determination was made as a matter of law and was designed to guide the trial court on remand. Moreover, we agree with the determination that the October 1985 agreement is, at least in part, a collective bargaining agreement because, as stated in 45 U.S.C.

§151a, 152 (1988), it is an agreement "concerning rates of pay, rules, and working conditions."

II.

We further conclude that the trial court properly determined that the contract is a whole and is not severable.

The primary objective in the severability inquiry is to ascertain the intent of the contracting parties. The relevant question is whether a number of promises constitute one contract or more than one, and such issue is to be determined by inquiring whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever if any promise or set of promises were struck out. John v. United Advertising, Inc., 165 Colo. 193, 439 P.2d 53 (1968).

Here, the trial court ruled that continued labor concessions were the consideration for the promise not to merge or sell off assets of the airline. It further noted that the written contract contained no indication of the intention of the parties for the contract to be severable.

We thus conclude that the trial court properly determined that the contract was not severable.

III.

The dispositive determination thus becomes whether plaintiffs' claims are preempted as a matter of law. We conclude, as did the trial court, that they are preempted.

In determining whether federal preemption exists under the RLA, the federal circuits have turned to the test announced under §301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a) (1988). See Baylis v. Marriott Corp., 906 F.2d 874 (2d Cir. 1990); Beard v. Carrollton R.R., 893 F.2d 117 (6th Cir. 1989).

Under §301, "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted . . . ." Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 405-06, 108 S.Ct. 1877, 1881, 100 L.Ed.2d 410, 426 (1988) (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985)).

The pertinent question in regard to preemption is whether "the state-law claim[s] can be resolved without interpreting the agreement itself." Lingle v. Norge Division of Magic Chef, Inc., supra, 486 U.S. at 410, 108 S.Ct. at 1883, 100 L.Ed.2d at 421.

A.

First, however, relying on 45 U.S.C. §152, which addresses "any dispute between the carrier and the employees thereof," plaintiffs contend that the Railway Labor Act, by its terms, applies only to collective bargaining issues between an employer and its employees, and not employees of a third party. Plaintiffs assert that the dispute in this action is between United Airlines and former employees of Frontier Airlines and that the RLA precludes preemption. We disagree.

The preemption analysis set forth in Lingle has been applied in cases involving claims against a nonsignatory to a collective bargaining agreement. See International Union, United Mine Workers of America v. Covenant Coal Corp., 977 F.2d 895, 899 (4th Cir. 1992) ("holding that section 301 of the LMRA bars a federal cause of action for tortious interference with contract, yet simultaneously preempts the identical state law cause of action"); Dougherty v. Parsec, Inc., 872 F.2d 766 (6th Cir. 1989) (holding that a state-law claim for tortious interference with a business relationship was not preempted under the Lingle test); see also Milne Employees Ass'n v. Sun Carriers, Inc., 960 F.2d 1401 (9th Cir. 1991) (holding that a nonsignatory to a CBA has standing to remove a case on the basis of section 301 preemption if resolution of the state law claim requires interpretation of the collective bargaining agreement and, then, applying the Lingle test to the state-law claims

raised); Baylis v. Marriott Corp., supra (holding that a state-law claim for tortious inducement or breach of contract was preempted); Brotherhood Railway Carmen v. Missouri Pacific R.R. Co., 944 F.2d 1422 (8th Cir. 1991) (holding that tortious interference claim was preempted).

Further, we conclude that United has standing to raise this defense.

Because of our resolution of this issue, we need not address plaintiffs' claim that the trial court erred by applying the law of the case doctrine to conclude that United had standing to raise a preemption defense.

B.

We now turn to plaintiffs' claims and apply the Lingle test. Here, plaintiffs' first claim for relief is for intentional interference with contractual relations.

This tort has been defined as follows:

> One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other

> from the failure of the third person to perform the contract.

Memorial Gardens, Inc. v. Olympian Sales & Management Consultants, Inc., 690 P.2d 207, 210 (Colo. 1984); see Dougherty v. Parsec, Inc., supra.

In their amended complaints, plaintiffs allege that United tortiously interfered with the October 1985 agreement by "wrongfully converting indispensable Frontier assets with the intended and foreseeable result that plaintiffs would be irreparably damaged." Plaintiffs further contend that "[b]y wrongfully obtaining Frontier's key assets, and then reneging on the Agreement [presumably the July 1986 Agreement] to purchase the stock and integrate the employees, United destroyed all Frontier operations and assured the non-existence of the jobs of the plaintiffs." In plaintiffs' response to United's motion for summary judgment on the issue of preemption, they contend that United tortiously interfered with the October 1985 agreement by inducing People to violate the agreement.

The underlying basis for the claim appears to be that People sold Frontier's assets to United either because 1) United tortiously induced People to enter into the July 1986 agreement and fraudulently induced plaintiffs to approve the agreement which resulted in a violation of plaintiffs' rights under the October 1985 agreement; or 2) United tortiously induced People to enter into the July

1986 agreement and without obtaining plaintiffs' approval, in violation of plaintiffs' rights under the October 1985 agreement.

In either case, plaintiffs' rights under this claim for relief stem from those terms of the October 1985 agreement which define or integrally involve plaintiffs' working conditions and consideration provided for plaintiffs' acceptance of those working conditions. In our view, the state-law claim could not be determined without deciding plaintiffs' continuing rights and obligations under the October 1985 agreement.

Moreover, plaintiffs' claim ultimately requires a determination of the continuing validity of the October 1985 agreement. We recognize that this presents a different question than that of interpreting the meaning of the term in an admittedly valid collective-bargaining agreement. However, the supreme court in Lingle v. Norge Division of Magic Chef, Inc., supra, again confirmed that the underlying rationale in preempting state-law claims is to avoid inconsistent results under collective-bargaining agreements.

In the usual case, the validity of the agreement is not in question and the issue is whether the state-law claim depends upon the meaning of terms contained in the admittedly valid agreement. However, when the state-law claim depends upon a determination of the very validity of

the collective-bargaining agreement, inconsistent results are no less a concern.

We therefore conclude that, in the unusual circumstances presented here, because the state-law claim would in effect depend on our determination of the validity of the July 1986 agreement, which in turn would, in effect, determine the continuing validity of the October 1985 agreement, pre-emption is equally appropriate.

C.

Plaintiffs' second claim for relief is for "Breach Of Contract/Third Party Beneficiaries."

The July 1986 agreement provides:

> 2. The foregoing transaction is subject to the conclusion by no later than July 31, 1986, subject to ratification by the unions if required, by August 31, 1986, of agreements satisfactory to United with labor unions representing its employees and the employees of Frontier, concerning the terms and conditions applicable to United's acquisition and operation of Frontier. United agrees to use its best efforts to obtain such agreements.

In addition, United's purchase of assets under the July 1986 agreement was "subject to (1) any approvals of Frontier unions required pursuant to paragraph 11 of the agreement dated October 17, 1985."

To determine whether United breached the July 10, 1986 agreement requires an interpretation of the October 17, 1985 agreement.

Thus, we conclude that this claim is also preempted.

D.

Plaintiffs' third claim for relief is for intentional infliction of emotional distress and extreme and outrageous conduct.

Outrageous conduct is committed if, by extreme and outrageous conduct, an individual intentionally or recklessly causes severe emotional distress to another. Rubenstein v. South Denver National Bank, 762 P.2d 755 (Colo. App. 1988); CJI Civ. 3d 23:1 (1989). To qualify as outrageous, the offending conduct must go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. Churchey v. Adolph Coors, 759 P.2d 1336 (Colo. 1988); CJI Civ. 3d 23:2 (1989).

In their amended complaints plaintiffs claim that United's "acts and/or omissions and other wrongful

conduct" amount to extreme and outrageous conduct. Plaintiffs do not specify particulars concerning the outrageous conduct, except by incorporating previous allegations under this claim.

However, as the trial court noted:

> Plaintiffs in this case are not able to state the elements of their claim for outrageous conduct without reference to the October 17, 1985 contract. What plaintiffs are alleging, in essence, is that the outrageous act was obtaining Frontier's corporate operational assets. Even if true such action standing alone is not outrageous. It may become outrageous only in relation to a contract which prohibits such action. Therefore, under the unique facts of this case the claim of outrageous conduct would of necessity call for an interpretation of the October 17, 1985 contract.

Because the conduct here involves interpretation of a collective bargaining term, we conclude that plaintiffs' claim is preempted.

E.

In their fourth claim for relief, plaintiffs contend that United induced plaintiffs to accept and agree to the

July 1986 agreement with fraudulent representations that United would not only purchase the assets of Frontier but also its stock, and would continue the business and thereby protect Frontier's employees.

The elements of fraud include: (1) a false representation of a material existing fact; (2) knowledge on the part of the one making the representation that it is false; (3) ignorance on the part of the one to whom the representation is made of the falsity; (4) intention by the one making the representation that it be acted upon; (5) and action on the representation resulting in damage. Kinsey v. Preeson, 746 P.2d 542 (Colo. 1987). Moreover, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." C.R.C.P. 9(b).

The crux of this claim for relief is that United used fraud or misrepresentations to induce plaintiffs' approval as required by the July 1986 agreement. Without plaintiffs' approval or waiver, the sale would violate both the October 1985 agreement and the July 1986 agreement.

Under the fifth requirement, plaintiffs must act on the representation. Here, plaintiffs must demonstrate that, through fraud, plaintiffs relinquished protections they had obtained in the October 1985 agreement.

Once again, plaintiffs' claim requires interpretation of the October 1985 agreement and, thus, is preempted.

The judgment is affirmed.

JUDGE DAVIDSON and JUDGE BRIGGS concur.

(3)

No. 95-282

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

October Term 1995

ROGER O. BROOKS, et al.

Petitioners,

v.

UNITED AIRLINES, INC., et al.

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Colorado

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Respondents' *Brief in Opposition* raises arguments as to why this Court should not grant *certiorari* and hear the merits of this case. Those contentions will be addressed *seriatim*.

A. THE *LINGLE* STANDARD NEEDS TO BE CLARIFIED AND IF NECESSARY NARROWED IN CASES WHERE THE APPLICATION OF RLA-BASED PREEMPTION DOES NOT INVOLVE UNIFORMITY OR PREDICTABILITY OF COLLECTIVE BARGAINING AGREEMENTS IN LABOR-MANAGEMENT RELATIONS

This is a unique and important case which presents a matter of first impression to this Court, to-wit, whether the doctrine of preemption under the Railway Labor Act ("RLA") otherwise applicable to the parties to an existing collective bargaining agreement ("CBA") should be judicially expanded to extinguish independent state claims involving unrelated parties not bound by any CBA or labor-management relationship under the RLA. Otherwise stated, is it consistent with Congressional intent and this Court's precedents to extend preemption under the RLA to parties who have no relationship or recourse under the RLA.

Such a pervasive interpretation of preemption operates to completely extinguish otherwise valid state law claims and leaves the injured parties, the Plaintiffs herein, without a remedy or recourse under law. Preemption was never designed or intended by Congress to effect such a harsh result, and this Court mandated in its decision in *Hawaiian Airlines, Inc. v. Norris*, 114 S.Ct. 2239 (1994) that the "threshold question" to be determined by the Court in a preemption case is "whether the dispute was subject to the RLA in the first instance." 114 S.Ct. at 2251. This threshold determination was never made in the case at bar.[1] Because the RLA does not apply to the parties or

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[1] The operative Colorado Court of Appeals decision was issued on June 16, 1994, four days before this Court's decision in *Hawaiian Airlines*. App. at pps. A-1 through A-20. The Colorado Supreme Court denied *certiorari* review. App. at pps. A-21 through A-30.

facts in this case, the directive of *Hawaiian Airlines*, had it been followed, would have compelled a different result than that reached by the Colorado Courts.

The Colorado Court of Appeals determined as a matter of law that Respondent United Airlines (Defendant below), an entity with which Petitioners (Plaintiffs below) had no contractual, employment or RLA-based relationship, had standing to raise a preemption defense under the RLA. The Colorado Court further determined as a matter of law that Plaintiffs' independent state claims against United were preempted under the RLA, thereby leaving Plaintiffs with no state, federal, contractual or administrative remedy or forum to adjudicate their claims against United.[2]

It is undisputed, indeed conceded, that at no time have any of the parties in this case ever occupied any relationship under the RLA or any labor relationship of any kind. No CBA or other contractual relationship exists (or has ever existed) between the parties. The parties never agreed to resolve their differences through any dispute resolution procedure, RLA-based or otherwise, and none of the parties are bound or required to arbitrate anything. The underlying policy of federal preemption under the RLA - the uniform interpretation of CBAs - is not an issue in this case because the parties are not litigating or disputing the interpretation or application of any CBA between them.

Respondents correctly state that the rationale for RLA-based preemption is "to promote uniformity and predictability in the meaning of collective bargaining agreements," but it necessarily follows, however, that where the rationale of preemption does not exist, preemption itself is inapplicable. Because Plaintiffs' common law fraud and contract claims against United do not arise under or require the interpretation of any CBA involving the parties, the standard set forth in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988) is inappropriate to the facts and parties in this case.

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[2] App. at pps. A-1 through A-20.

Unlike the Plaintiffs herein, the Plaintiff in *Lingle* was an employee who pursued a remedy provided by the grievance procedure established under the collective bargaining agreement between her union and the company. Simultaneously with the grievance procedure, however, the Plaintiff-employee filed a wrongful discharge action in state court alleging that the Defendant-employer fired her because she had filed a workers compensation claim. 486 U.S. at 401-02. Although both the Federal District Court and the Seventh Circuit Court of Appeals held that the employee's state law claim was "inextricably intertwined" with the collective bargaining agreement and was thus preempted, the Supreme Court in *Lingle* disagreed and reversed the preemption finding. *Id.* at 409-10. Reaffirming the necessity of promoting the uniformity of interpretation of CBAs in labor-management disputes, *Lingle* nonetheless determined that, even if the issues presented by the CBA and the state law claims "would require addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes." *Id.*

Plaintiffs' claims in this case can be resolved without interpreting any CBA between the parties because no such agreement exists. Nor does the underlying rationale of promoting stability of labor-management relations and the uniformity of interpretation of CBAs apply to the facts and parties in this case. No labor-management relationship exists and no CBA between the parties is in dispute. The inapplicability of the *Lingle* standard follows *a fortiori* in the case at bar. Where the rationale of *Lingle* does not apply, *Lingle* does not apply.

The doctrine of preemption is at its heart a containment mechanism designed and intended by Congress to preempt state law claims by employees which are intended by management and labor to be settled within the confines of a bargained-for grievance procedure in an existing CBA. *Id.* at 405-10. Allow-

ing labor-management disputes to be determined on a state-by-state basis outside the confines of the parties' dispute resolution procedures threatens the stability of labor-management relations and the uniformity of the interpretation of CBAs, and preemption exists to prevent this. What is beyond peradventure, however, is the fact that neither the rationale of preemption nor the intent of Congress in enacting the RLA should have any application to independent disputes between unrelated parties that do not involve any labor-management relationship nor the uniformity of application of any CBA between the parties.

The Sixth Circuit succinctly analyzed this issue in *Dougherty v. Parsec, Inc.*, 872 F.2d 766, 770-71 (6th Cir. 1989) as follows:

> One of the basic concerns of the Supreme Court in [*Lueck*] was that application of state law to labor contract terms would result in uncertainty in contract negotiations and increase the number of disputes over contract interpretation. Here, allowing a state law action to proceed against a party who has not signed the labor contract, and whose obligations are not defined by the contract, will neither define nor modify the contractual relationship between the employer and the union...
>
> Another major policy underlying *Lueck* was the concern that permitting state law claims would allow plaintiffs to avoid the fundamental labor policy that contract disputes should be decided by arbitrators in the first instance. 'That is not a problem where a tortious interference with contract claim is being made against a non-signatory' because the non-signatory is not bound by the contract (hence not bound to arbitrate).

Neither *Lingle* nor *Lueck* nor any other decisions by this Court hold that the rational behind RLA-based preemption

should be applied to parties who have no RLA relationship and no CBA at issue between them. An unwarranted extension of the *Lingle* standard to the facts and parties of this case is inappropriate and unfair, and Petitioners submit that this Court must clarify, and if necessary narrow the *Lingle* standard to ensure that legitimately injured Plaintiffs who have no recourse other than state court, are not preempted from bringing independent claims by a federal doctrine whose rationale does not apply to them.

The legal dispute herein turns on two contracts, one involving Plaintiffs and their employer, Frontier Airlines, and one involving United and People Express. The first contract was entered into on October 17, 1985 between Plaintiffs, Frontier Airlines, and People Express. The October 17, 1985 Agreement contained contractually enforceable terms prohibiting Frontier and People from, *inter alia,* selling Frontier's assets above a certain value to any third party. The second contract was entered into on July 10, 1986 between United and People, and it provided for the sale of Frontier by People to United. Plaintiffs were not a party to this agreement.

This Court cautioned in *Lueck* that "not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is preempted by § 301 or other provisions of the federal labor law...." 471 U.S. at 211-212. The dispute in the case at bar does not concern employment, and Plaintiffs' fraud and contract claims can be resolved without interpreting any CBA between the parties. The Colorado Court determined that the October 17, 1985 Agreement was only "in part" a CBA, and the July 10, 1986 Agreement is not a CBA at all. Neither of these agreements provides any grievance mechanisms or dispute resolution procedures applicable to the parties in the case at bar. Substantive protections against fraud and tortious interference with contract exist under Colorado law, and this Court noted in *Hawaiian Airlines* that its earlier prece-

dents uphold the proposition that "substantive protections provided by state law, independent of whatever labor agreement might govern, are not preempted under the RLA." 114 S.Ct. at 2246.

B. PETITIONERS SHOULD NOT BE DEPRIVED OF A REMEDY FOR THEIR INDEPENDENT STATE CLAIMS BASED ON A STATUTORY DEFENSE INAPPLICABLE TO THE PARTIES

Hawaiian Airlines rejects any kind of "pervasive preemption" and requires a determination at the "threshold" to whether the RLA even applies to the parties before preemption is applicable. The RLA does not apply to the parties in this case, a fact not in dispute, and the time has come for this Court to clarify, and if necessary narrow the standard to prevent the broad and pervasive extinguishment of Plaintiffs' contract rights based on a federal statute inapplicable to the parties.

Hawaiian Airlines reaffirmed the proposition stated in *Allis-Chalmers v. Lueck*, 471 U.S. 202, 208 (1985) that whether "federal law preempts a state law establishing a cause of action is a question of congressional intent." 114 S.Ct. at 2243. *Hawaiian Airlines* found that the RLA "establishes a mandatory arbitral mechanism" to resolve disputes between parties to an existing collective bargaining agreement, and held that "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." 114 S.Ct. at 2243-44.

Petitioners submit that *Hawaiian Airlines* has properly defined the scope and application of RLA-based preemption consistent with Congressional intent so as to leave no room for doubt that application of preemption to a case which does *not* involve the policy or rational of promoting "stability in labor-management relations" is inappropriate.

If the true intent of Congress and the true purpose of preemption were to extinguish state law claims in cases where the stability of labor-management relations was *not* at issue, and where the parties were *not* seeking to resolve a labor-management dispute, then Petitioners respectfully submit that this Court would have articulated both that proposition and the underlying Congressional intent to support it in *Hawaiian Airlines*.[3]

The inapplicability of the RLA to these parties renders the application of RLA-based preemption even more inappropriate and egregious; it is unjust, unfair and inequitable, as well as contrary to Congressional intent, to apply the RLA to Plaintiffs *only* insofar as it preempts their claims, but not insofar as it provides them with a remedy. That was never the intent of Congress in enacting the RLA. 114 S.Ct. at 2243-44.

The inconsistency of this harsh result, and the significance of the *Hawaiian Airline* requirement of a threshold determination, can be seen clearly in connection with the argument advanced by Respondents that the "question of whether the Plaintiffs have an alternative remedy under federal law is not before this Court because the Plaintiffs have chosen not to attempt to invoke the Railway Labor Act or any other federal law as a basis for recovery." [*Brief in Opposition* at 16].

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[3] The RLA clearly states that Congress intended the Act to apply only to disputes between "the carrier and the employees thereof," and absent a clearly expressed Congressional intent to the contrary, the statutory language of the RLA should be regarded as conclusively prohibiting the expansion of its purview beyond its stated terms. Nowhere in the Congressional history of the RLA is there any evidence of any Congressional intent to expand the scope of RLA-based preemption beyond its limited application to the labor or employment relationship; indeed, the *Hawaiian Airlines* court noted that the "inconclusive [Congressional] debate hardly calls for fashioning a broad rule of preemption," and held that the language of the RLA "does not compel the conclusion that all issues touching on the employment relationship must be resolved through arbitration or that all claims involving rights and duties that exist independent of the CBA are thereby preempted. Our precedents squarely reject this pervasive preemption." 114 S.Ct. at 2245, notes 4 and 5

This argument is a *non sequitur* because the RLA, were it applicable to these parties, *would* provide a remedy. Plaintiffs are precluded from invoking the RLA to resolve the claims at issue herein because they have no labor or contractual or RLA-based relationship with Respondents that would enable them to do so. The parties in this case are strangers to each other, brought together in litigation by the fact that United tortiously breached and interfered with contract rights held by Plaintiffs which were unrelated to and independent of the RLA.

Respondents argue that it is irrelevant whether preemption of Plaintiffs' claims effectively grants United immunity, and equally irrelevant whether Plaintiffs are left without a remedy. Respondents argue that the "question of what remedy is available under the controlling federal law is a separate and distinct question which has no bearing on the preemption inquiry." [*Brief in Opposition* at 15-16]. Petitioners disagree.

It should *always* matter, particularly to this Court, whether legitimately injured Plaintiffs otherwise entitled to a remedy at law have been completely foreclosed from their day in Court, and it should *always* concern this Court that Defendants otherwise liable for their actions have been granted immunity by the broad application of a federal statute.

There should be no higher purpose for *Hawaiian Airline's* directive that a "threshold" determination be made as to whether the RLA even applies than in a case such as this one, where the erroneous application of RLA-based preemption extinguishes independent state claims and leaves the injured parties without a remedy against the entity which has harmed them. Along these lines, Respondents advance the argument that Plaintiffs had the ability under the RLA to pursue claims "directly against their employer," Frontier Airlines, for breach of the Plaintiffs' contractual rights. [*Brief in Opposition* at 15, note 5]. What Respondents failed to mention, however, is the fact that the activities by United which form the basis for this action resulted

in the financial collapse and resulting bankruptcy of Frontier Airlines, an insolvent entity. Plaintiffs are entitled under Colorado law to bring claims against the party which has caused them harm, i.e., United, and it is no defense for such a party to assert that Plaintiffs might have had separate claims against another entity, particularly when that party's own actions rendered the other entity insolvent and incapable of providing a remedy.

For this very reason, Federal Courts have held that "'it would not further the policies of either the Congress in enacting the federal labor statutes, or the Supreme Court in *Lueck*, to give a third party who has allegedly interfered with a labor contract what effectively amounts to immunity,'" *Dougherty v. Parsec, Inc.*, 872 F.2d 766, 771 (6th Cir. 1989), and have cautioned against the "paradox" inherent in allowing preemption to be used to extinguish claims that leave the injured parties without "an adequate forum for resolution of their claims." *International Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 899-900 (4th Cir. 1992).

C. RESPONDENTS' "ADDITIONAL REASONS" FOR DENYING THE PETITION FOR WRIT OF CERTIORARI UNDERSCORES THE EXTREME INJUSTICE OF THIS CASE

Respondents argue that it would be "inappropriate" for this Court to review the opinion of the Colorado Court of Appeals because that opinion "was not selected for official publication," and assert that such an opinion "would not create any confusion among the lower courts as to the proper application of this Court's preemption precedents." [*Brief in Opposition* at 18].

The contention that this Court should shrink from hearing this case because the nullification of Plaintiffs' state claims was done through an unpublished opinion is both outrageous and troubling on several levels. No Court should *ever* be allowed to evade judicial review or scrutiny by this Court by rendering a decision designated as "unofficial" or "unpublished."

Moreover, such decisions affect the *substantive rights* of the litigants, and have had a very real and damaging affect on Plaintiffs. The Colorado Court of Appeals' decision expanded the *Lingle* standard beyond both Congressional intent and the express terms of the RLA, and did so in a way inconsistent with this Court's ruling in *Hawaiian Airlines*. It matters not whether such a ruling, which affects the legal and substantive rights of the litigants, is published or not. Injustice anywhere, particularly behind closed doors, is a threat to justice everywhere.

Petitioners respectfully pray for the issuance of a writ of *certiorari* in this case.

Respectfully submitted,

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